

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,923

United States Court of Appeals
For the
District of Columbia Circuit

FILED JAN - 7 1958

Joseph W. Stewart
CLERK

LUCIOUS JOHNSON, Jr.

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

789

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INDEX

	<u>Record Page</u>	<u>Appendix Page</u>
Indictment	1	1
Plea of Defendant	5	4
Judgment and Commitment	7	5
Notice of Appeal, Filed May 20, 1957	8	5
Notice of Appeal, Filed May 22, 1957	9	6
Excerpts from Transcript of Proceedings	15	7
Witnesses:		
Joseph Levine		
Direct	24	7
Cross	48	19
James B. Cole		
Direct	57	20
Cross	73	27
Fred T. Dick		
Direct	75	27
James L. Young		
Direct	108	35
Cross	115	38
Lucious Johnson, Jr.		
Direct	117	38
Cross	127	39
Summation on Behalf of the Defendant		
By: William A. Robinson, Esq.	161	47
The Court's Charge To The Jury	170	48
Verdict of the Jury	186	58

JOINT APPENDIX

1 [Filed in Open Court, December 21, 1956]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Impanelled November 1, 1956, Sworn in on November 6, 1956

THE UNITED STATES OF AMERICA	)	Criminal No. 1307-56
v.	)	Grand Jury No. 1503-56
LUCIOUS JOHNSON, Jr.	)	Vio. 26 U.S.C. 4704a, 4705a
		21 U.S.C. 174

The Grand Jury charges:

On or about September 12, 1956, within the District of Columbia, Lucious Johnson, Jr. did sell, barter, exchange and give away to Joe Levine a narcotic drug, that is, ten capsules containing a mixture totaling about 8.5 grains of heroin hydrochloride, quinine hydrochloride, milk sugar and mannitol, not in pursuance of a written order, written for that purpose, from the said Joe Levine.

SECOND COUNT:

On or about September 12, 1956, within the District of Columbia, Lucious Johnson, Jr. purchased, sold, dispensed and distributed, not in the original stamped package and not from the original stamped package, a narcotic drug, that is, ten capsules containing a mixture totaling about 8.5 grains of heroin hydrochloride, quinine hydrochloride, milk sugar and mannitol. This is the same heroin hydrochloride which is mentioned in the first count of this indictment.

THIRD COUNT:

On or about September 12, 1956, within the District of Columbia, Lucious Johnson, Jr. facilitated the concealment and sale of a narcotic

drug, that is, ten capsules containing a mixture totaling about 8.5 grains of heroin hydrochloride, quinine hydrochloride, milk sugar and mannitol, after the said heroin hydrochloride had been imported, with the knowledge of Lucious Johnson, Jr., into the United States contrary to law. This

2 is the same heroin hydrochloride which is mentioned in the first and second counts of this indictment.

FOURTH COUNT:

On or about September 12, 1956, within the District of Columbia, Lucious Johnson, Jr. did sell, barter, exchange and give away to James B. Cole a narcotic drug, that is, eight capsules containing a mixture totaling about 6.7 grains of heroin hydrochloride, quinine hydrochloride and milk sugar, not in pursuance of a written order, written for that purpose, from the said James B. Cole.

FIFTH COUNT:

On or about September 12, 1956, within the District of Columbia, Lucious Johnson, Jr. purchased, sold, dispensed and distributed, not in the original stamped package and not from the original stamped package, a narcotic drug, that is, eight capsules containing a mixture totaling about 6.7 grains of heroin hydrochloride, quinine hydrochloride and milk sugar. This is the same heroin hydrochloride which is mentioned in the fourth count of this indictment.

SIXTH COUNT:

On or about September 12, 1956, within the District of Columbia, Lucious Johnson, Jr. facilitated the concealment and sale of a narcotic drug, that is, eight capsules containing a mixture totaling about 6.7 grains of heroin hydrochloride, quinine and milk sugar, after the said heroin hydrochloride had been imported, with the knowledge of Lucious Johnson, Jr., into the United States contrary to law. This is the same heroin hydrochloride which is mentioned in the fourth and fifth counts of this indictment.

SEVENTH COUNT:

On or about September 15, 1956, within the District of Columbia, Lucious Johnson, Jr. did sell, barter, exchange and give away to

James B. Cole a narcotic drug, that is, ten capsules containing a mixture totaling 11.0 grains of heroin hydrochloride and milk sugar, not in pursuance of a written order, written for that purpose, from the said James B. Cole.

EIGHTH COUNT:

On or about September 15, 1956, within the District of Columbia, Lucious Johnson, Jr. purchased, sold, dispensed and distributed, not in the original stamped package and not from the original stamped package, a narcotic drug, that is, ten capsules containing a mixture totaling about 11.0 grains of heroin hydrochloride and milk sugar. This is the same heroin hydrochloride which is mentioned in the seventh count of this indictment.

NINTH COUNT:

On or about September 15, 1956, within the District of Columbia, Lucious Johnson, Jr. facilitated the concealment and sale of a narcotic drug, that is, ten capsules containing a mixture totaling about 11.0 grains of heroin hydrochloride and milk sugar, after the said heroin hydrochloride had been imported, with the knowledge of Lucious Johnson, Jr., into the United States contrary to law. This is the same heroin hydrochloride which is mentioned in the seventh and eighth counts of this indictment.

TENTH COUNT:

On or about September 19, 1956, within the District of Columbia, Lucious Johnson, Jr. did sell, barter, exchange and give away to James B. Cole a narcotic drug, that is, twenty capsules containing a mixture totaling about 34.0 grains of heroin hydrochloride, quinine hydrochloride and milk sugar, not in pursuance of a written order, written for that purpose, from the said James B. Cole.

ELEVENTH COUNT:

On or about September 19, 1956, within the District of Columbia, Lucious Johnson, Jr. purchased, sold, dispensed and distributed, not in the original stamped package and not from the original stamped

package, a narcotic drug, that is, twenty capsules containing a mixture totaling about 34.0 grains of heroin hydrochloride, quinine hydrochloride and milk sugar. This is the same heroin hydrochloride which is mentioned
4 in the tenth count of this indictment.

TWELFTH COUNT:

On or about September 19, 1956, within the District of Columbia, Lucious Johnson, Jr. facilitated the concealment and sale of a narcotic drug, that is, twenty capsules containing a mixture totaling about 34.0 grains of heroin hydrochloride, quinine hydrochloride and milk sugar, after the said heroin hydrochloride had been imported, with the knowledge of Lucious Johnson, Jr., into the United States contrary to law. This is the same heroin hydrochloride which is mentioned in the tenth and eleventh counts of this indictment.

/s/Oliver Gasch

Attorney of the United States in
and for the District of Columbia

A TRUE BILL:

/s/ Paul May
Foreman.

5 [Filed January 4, 1957]

PLEA OF DEFENDANT

On this 4th day of January, 1957, the defendant Lucious Johnson, Jr. appearing in proper person and by his attorney Jean Dwyer, being arraigned in open Court upon the indictment, the substance of the charge being stated to him, pleads not guilty thereto.

The defendant is remanded to the District Jail.

By direction of
RICHMOND B. KEECH
Presiding Judge
Criminal Court 1

Present:

United States Attorney
By Victor Caputy
Assistant United States Attorney
T. O'Neal
Official Reporter

HARRY M. HULL, Clerk
By Daniel J. Mencoboni
Deputy Clerk

7 [Filed April 16, 1957]

On this 12th day of April, 1957 came the attorney for the government and the defendant appeared in person and by counsel, W. A. Robinson, Esquire.

It is adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of

Violation Title 26 United States Code, Section 4704a,
4705a; Title 21 United States Code, Section 174.

as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Eight (8) years on Count 1, 3, 4, 6, 7, 9, 10, 12; said sentence by the counts to run concurrently Two (2) years to Six (6) years on Counts 2, 5, 8, 11; said sentence on each count to run concurrently; said sentence on counts 2, 5, 8, 11 to run concurrently with sentence imposed on Counts 1, 3, 4, 6, 7, 9, 10, 12.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Luther W. Youngdahl

United States District Judge

8 [Filed May 20, 1957]

Let the Appeal be allowed in
forma pauperis -- L.W. Youngdahl **NOTICE OF APPEAL**

Comes now Petitioner Lucious Johnson, Jr. in proper person, request this Honorable Court's permission to file an Appeal in Forma Pauperis.

That your Petitioner was tried and convicted for the violation of

the narcotic laws, Section 26 U.S.C. 4704a, 4705a, 21 U.S.C. 174.

That it was adjudged by the court for the defendant to be turned over to the United States Attorney General or his authorized agent to be imprisoned for a period of Eight (8) years on the 12th day of April, 1957.

I, Lucious Johnson, Jr., the above named Petitioner, hereby file Notice to Appeal the said conviction.

Key Witness in my behalf was not subpoenaed as requested.

/s/ Lucious Johnson, Jr.

District of Columbia, ss

[JURAT]

9 [Filed May 22, 1957]

NOTICE OF APPEAL

Name and address of appellant: Lucious Johnson, Jr.
District of Columbia Jail
200 19th St., S.E.
Washington, D.C.

Name and address of appellant's attorney

Offense: Vio. T. 26 U.S. Code 4704a, 4705a; 21 U.S. Code 174

Concise statement of judgment or order, giving date, and any sentence
Sentenced to imprisonment for a period of Eight years on Ct. 1, 3,
4, 6, 7, 9, 10, 12; said sentence by the counts to run concurrently;
Two years to Six years on Counts 2, 5, 8, 11; said sentence on each
count to run concurrently; said sentence on counts 2, 5, 8, 11 to run
concurrently with sentence imposed on Counts 1, 3, 4, 6, 7, 9, 10, 12.
April 12, 1957

Name of institution where now confined, if not on bail

District of Columbia Jail

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

May 22, 1957

Date

LUCIOUS JOHNSON, JR.

Appellant

Attorney for Appellant

15 [Filed November 12, 1957]

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

Washington, D.C.

March 27, 1957

The above-entitled matter came on for hearing at 10:00 o'clock, a.m., before the HONORABLE LUTHER W. YOUNGDAHL, Judge in the United States District Court for the District of Columbia, and a jury.

APPEARANCES:

ARTHUR J. McLAUGHLIN, Assistant District Attorney,
for the Government.

WILLIAM A. ROBINSON, Esq.,
for the defendant.

* * * * *

24

JOSEPH LEVINE

* * * * *

DIRECT EXAMINATION

BY MR. MC LAUGHLIN:

Q. What is your name? A. Joseph Levine.

Q. How do you spell it? A. L-e-v-i-n-e.

Q. Where do you live, Mr. Levine? A. Baltimore.

Q. Baltimore, Maryland? A. Yes.

Q. Calling your attention to September 10 of 1956, were you in the District of Columbia on that date? A. I was.

Q. And whereabouts in the District of Columbia were you on or about September 10 of 1956? A. On September 10 about 8:00 o'clock I met at the Washington Field Office with Agent Fred Dick and Agent Fialkewicz.

25 Q. At that time did Agent Dick give you anything? A. He give me Government funds.

Q. How much did he give you, can you recall? A. I can recall.

Q. How much? A. \$15.00.

Q. After Agent Dick gave you the \$15.00 in the Federal Bureau of Narcotics office, where did you go? A. I went directly to 1229 Euclid Street.

Q. How did you get to 1229 Euclid Street? A. In my personal car.

Q. Was there anyone riding with you? A. No one riding with me.

THE COURT: Is that Euclid, Northeast or Northwest?

THE WITNESS: Northwest.

BY MR. MC LAUGHLIN:

Q. And what time would you say you arrived at 1229 Euclid Street, Northwest? A. About 9:45.

Q. By the way, that is in the District of Columbia, is it not?
A. Yes.

26 Q. What happened after you arrived at 1229 Euclid Street, Northwest? A. I entered the basement apartment and I asked for defendant Lucius Johnson. He wasn't in at the time, but his wife stated she was his wife and he would soon be back. And shortly, five or ten minutes after I entered the house, he came in with three colored men.

Q. You say he. Who do you mean? A. Lucious Johnson. And he told me that -- he spoke to me, told me he'd talk to me in a few minutes. Shortly those three men left. He asked me what I wanted.

I told him I wanted to purchase some drugs, some heroin. He told me that he had sold the remaining of his drugs to the three colored guys that just left, but he would leave with me and he would see -- try to purchase some drugs for me.

He then got into -- we left his basement apartment, entered my car, and he directed me to drive to 7th Street between M and N where he stated to me to park. He got out of the car and he went to three colored women that was standing on 7th Street. He had a conversation with them. Shortly the three women and Johnson returned to my car and they all got in.

They then had a conversation of trying to locate the source of supply, and they thought of directing me to drive to different parts of the city. The women, they take turns going into the houses looking for, I guess, the source of supply. That's what they said.

Around 1:00 o'clock on the 11th--

Q. That is in the morning? A. In the morning.

27 THE COURT: I assume they said that in your presence?

THE WITNESS: In the presence of me, yes. About 1:00 on the 11th we wound up at Clifton Street, 1200 block of Clifton, where the girl Juanita got out of the car and went into the house on the opposite side of the street from the car. Shortly she returned and said that they was in there working and for all of us to get out of the car and come in.

The three women, myself and Johnson, we got out of the car and went into this apartment. After we was in there for approximately five minutes this colored man and a colored woman in there -- this colored man was passing out some capsules filled with white powder. He give each one of the girls an amount of capsules filled with white powder. He also give Johnson a cellophane package filled with capsules with white powder, and Johnson told this colored man that I was all right and that he could deal with me.

He then asked me how many things that I wanted, meaning capsules. I told him 15. The woman stated to him she didn't have but 10 left, and

if I wanted any more that I would have to wait. I told him that I would take the 10 because I had been out pretty near all night trying to purchase some drugs. So he give me 10 capsules of heroin. In return, I give him \$15.00.

28 BY MR. MC LAUGHLIN:

Q. Was Johnson present at the time she gave you the 15 capsules?

A. He was. It was 10 capsules.

MR. MC LAUGHLIN: Please mark this Government No. 1 for identification.

(Thereupon, the envelope referred to was marked as Government's Exhibit No. 1 for identification.)

THE COURT: What was the address of that apartment?

THE WITNESS: That was in the 1200 block.

THE COURT: Of what?

THE WITNESS: Of Clifton.

BY MR. MC LAUGHLIN:

Q. I show you Government exhibit marked for identification No. 1 and ask you if you can identify that, Mr. Levine. A. Yes, I can identify it.

Q. And you identify Government exhibit marked for identification No. 1 as what? A. As the narcotics I bought on the 11th of September.

Q. And how many capsules did you get? A. Ten.

Q. Now, at the time that you purchased those 10 capsules, did you give the defendant any order form issued by the Secretary of the Treasury for the purpose of purchasing narcotics? A. No, I didn't.

29 Q. Did you give an order form to the lady or man in those premises on Clifton Street that actually turned over to you those narcotics, an order form issued by the Secretary of the Treasury? A. No, I didn't.

Q. At the time you received those narcotics, were there any Government stamps of any kind on them? A. No, there wasn't.

Q. You referred to this man Johnson. Do you see him in court here today? A. Yes, I do.

Q. Will you point at him, please? How is he dressed? A. You mean that night?

Q. No. Now. A. He's got on a gray sweater.

MR. MC LAUGHLIN: May the record show he identifies the defendant.

THE COURT: The record may so show.

BY MR. MC LAUGHLIN:

Q. After that date, we call your attention to September 12. Were you in Washington, D.C., on September 12 of 1956? A. Yes, I was.

Q. Please answer. A. Yes, I was.

30 Q. At that time on September 12, '56, did you see Agent Dick of the Federal Bureau of Narcotics? A. I did.

Q. And where did you see him? A. I met him at the Washington Field Office.

Q. Approximately what time did you meet him? A. About 8:00 o'clock.

Q. In the evening? A. In the evening.

Q. At the time you met Agent Dick about 8:00 o'clock on September 12, was there anyone else with you? A. Officer Cole.

Q. Officer Cole? A. That's right.

Q. And while at the Federal Bureau of Narcotics office in Washington, D.C., did Officer Dick give you anything? A. He did. He give me Government funds.

Q. How much money did he give you at that time, on September 12? A. On September 12 he give me \$29.00.

Q. And was Cole present at the time that he gave you that money? A. Yes, he was.

Q. Were there any other moneys given to anyone else at that time in your presence? A. \$20.00 was given to Officer Cole.

31 Q. Who gave the \$20.00 to Officer Cole? A. Agent Fialkewicz.

Q. After you received the twenty-nine and Mr. Cole received the \$20.00, did you go any place from the Federal Bureau of Narcotics office? A. Yes, I did.

Q. And where did you go and who was with you? A. I left the Washington Field Office and come with Officer Cole, followed by the agents. I went directly to 1229 Euclid.

Q. What time would you say you arrived at 1229 Euclid on September 12? A. About 9:30, 9:45.

Q. That is p.m.? A. Yes.

Q. What happened after you arrived at 1229 Euclid Street, Northwest? A. Officer Cole and I got -- we got out and went into the Johnson apartment, where we met Johnson. I engaged him in a conversation.

Q. What conversation did you have with him? Relate it as near as you can. A. I told him I wanted to buy some more things, meaning capsules, of heroin.

32 Q. What did the defendant Johnson say or do when you said that? A. He told me that he could sell me some, and he asked me who was the guy with me. I told him he was a friend of mine. He then asked me how many things that I wanted to buy, meaning capsules.

THE COURT: When he said, "Who is the man with you", who is the man you are referring to?

THE WITNESS: Officer Cole.

BY MR. MC LAUGHLIN:

Q. Go ahead. What did Johnson say in response to that? A. I told him I wanted to buy 10 and my friend wanted to buy eight.

Q. Meaning who? A. Meaning Officer Cole. He stated that --

Q. You say "he." Use the name. A. Lucious Johnson told me that 10 capsules of heroin would cost me \$17.00 and that eight would cost my friend twelve. We agreed to buy them.

He stated that he would be back in a few minutes. He went out of the basement apartment and was gone approximately around 10 to 15 minutes. He returned. As he entered the house he separated the eight capsules from the 10 that he was going to sell -- sell me. He then passed me the 10 capsules filled with white powder and in return I give
33 him \$17.00.

He stated to me that he didn't know my friend good enough to make

a hand-to-hand sale with him. He asked me would I transact the sale. I told him I would. He then handed me the eight capsules of heroin. I handed them to Officer Cole. He give me \$12.00, and in return I passed it to Lucious Johnson.

Q. This transaction was all in the presence of the defendant Johnson? A. Yes.

Q. After you passed the moneys, then what next happened? A. We left the apartment and I met with the agent and I turned the evidence over to the agent.

Q. At that time on September 12 when you received the 10 capsules from the Defendant Johnson and also the eight capsules which you received from Johnson and turned over to Cole, did you at that time give the defendant any order form issued by the Secretary of the Treasury for the purpose of purchasing narcotics? A. No, I didn't.

Q. Did those 10 capsules that you received contain any Government stamps of any kind? A. No, they didn't.

34 Q. Did the eight capsules that you received from the defendant to give to Cole contain any Government stamps of any kind on them? A. No, they didn't.

THE COURT: Will you step to the bench, counsel.

(At the bench:)

THE COURT: I wanted to get this straight in my own mind. Is that first sale on the 11th?

MR. MC LAUGHLIN: Yes, Your Honor. They have it in the indictment the 12th.

THE COURT: These two are both on the 12th, the eight and 10?

MR. MC LAUGHLIN: Yes.

(In open court:)

MR. MC LAUGHLIN: Mark this Government exhibit for identification No. 2 and 2A.

(Thereupon, the envelopes referred to were marked as Government's Exhibits Nos. 2 and 2A for identification.)

BY MR. MC LAUGHLIN:

Q. Showing you Government exhibit marked for identification No. 2, I ask you if you can identify that. A. Yes, I can.

Q. And you identify Government Exhibit No. 2 as what? A. As the eight capsules of heroin that was sold to Officer Cole.

35 Q. Look at that. Count those capsules again. A. The 10 capsules that I bought from Johnson.

Q. Now, did they contain any Government stamps of any kind at the time you received them from Johnson? A. No, they didn't.

Q. I show you Government exhibit marked for identification No. 2A and ask you if you can identify that. A. These are the eight capsules that I passed from Johnson to Officer Cole.

Q. Did they contain any Government stamps at the time you received them from Johnson? A. No, they didn't.

Q. Did you give them any order form for the purpose of purchasing narcotics? A. No, I didn't.

* * * * *

37 Q. At that time in your presence prior to leaving the Federal Bureau of Narcotics, did Agent Fialkewicz or Agent Dick give you anything or give Mr. Cole anything in your presence? A. Lieutenant Fialkewicz give Officer Cole \$15.00.

Q. You say you and Officer Cole left. Where did you go? A. I went to 1229 Euclid Street.

Q. What time would you say you arrived at 1229 Euclid Street? A. Around 10:00 o'clock.

Q. In the morning? A. In the morning.

Q. What happened when you arrived at those premises, 1229 Euclid Street? A. I entered the basement apartment of 1229 and I saw
38 Lucious Johnson.

Q. Did anyone enter that apartment with you? A. Not on that morning.

Q. Just alone? A. Alone.

Q. You say you saw the defendant in those premises at that time? A. I did.

Q. What happened after you saw the defendant Johnson?

A. Well, I told him that I came back for some more things, meaning capsules of heroin. He then told me that there was a panic on in the city and things were pretty warm, but he thought he knew where he could purchase me some drugs at.

We then came out of the house. He came to my car and got in the car. Johnson got in the car with Officer Cole and myself. He then--

THE COURT: Cole was in the car?

THE WITNESS: Yes, he was. He didn't get out, and he directed me to drive.

BY MR. McLAUGHLIN:

Q. You say he-- A. Lucious Johnson directed me to drive several different places around town. Around 1:00 o'clock we ended up--

Q. That is p.m.? A. One o'clock in the afternoon, we ended
39 up at Minnesota and Hunt Street in Northeast.

Q. That is in Washington, D.C.? A. Washington, D.C., where Johnson got out of the car and went into an Esso Service Station on the corner out of our sight. Shortly he returned stating that the man only had 10 capsules of heroin and that he wanted the money. Officer Cole then passed the money to Johnson. Johnson then went back into the station, and in about ten minutes returned with a brown envelope containing ten capsules of white powder which he passed to me and I passed them direct to Officer Cole.

Q. Did you or Cole give the defendant any order form issued by the Secretary of the Treasury for the purpose of purchasing narcotics?
A. No, we didn't.

MR. McLAUGHLIN: Mark this Government exhibit for identification No. 3.

(Thereupon, the envelope referred to was marked as Government's Exhibit No. 3 for identification.)

BY MR. McLAUGHLIN:

Q. I show you Government exhibit marked for identification No. 3 and ask you if you can identify that, Mr. Levine. A. I can identify it.

Q. And you identify Government exhibit marked for identification
40 No. 3 as what? A. As 10 capsules of heroin that Johnson bought at Minnesota and Hunt Street, Northeast, Washington, D.C.

Q. Did you actually see him transfer those to Cole? A. I transferred them to Cole. He passed them to me.

Q. Who passed them to you? A. Johnson passed them to me when he got in the car and I handed them direct to Officer Cole.

Q. At the time Johnson handed them to you, did you give him any order form issued by the Treasury? A. No, I didn't.

Q. Did Cole give him any in your presence? A. No.

Q. Did Government Exhibit 3 contain any Government stamps of any kind? A. No, they didn't.

Q. With reference to the 10 capsules that were purchased on September 11 of 1956, who in turn did you turn them over to? A. To Agent Fred Dick.

Q. And the capsules purchased on September 12, the 10 capsules by you and the eight capsules by Mr. Cole, who in turn did you turn them over to? A. I turned mine over to Agent Dick.

Q. And did Cole turn them over to Agent Dick in your presence,
41 if you know? A. I don't know.

* * * *

Q. After September 15 of 1956 do you recall whether or not you were in Washington on September 19 of 1956? A. I was.

Q. Whereabouts in Washington were you on September 19 of 1956? A. Well, I met with agents at the Washington Field Office.

Q. And approximately what time would you say that was?
A. Around 8:30 in the morning, 8:00 or 8:30.

Q. Was there anyone with you at that time on September 18?
A. Officer Cole.

Q. While in the Federal Bureau of Narcotics on September 19, at that time did you receive anything from either Agent Fialkewicz or Agent Dick? A. No, I didn't receive anything.

Q. Did Mr. Cole receive anything from Agent Fialkewicz or Mr. Dick in your presence? A. He did.

42 Q. What did he receive? A. \$40.00.

Q. How much? A. \$40.00.

Q. After Mr. Cole received the \$40.00 in your presence, did you and Mr. Cole leave the Federal Bureau of Narcotics office?

A. Yes, we did.

Q. And what time would you say that you left the office? A. I'd say we left around nine.

Q. And where did you go? A. I went directly to 1229 Euclid Street.

Q. By what means of transportation did you get there? A. I was driving my personal car.

Q. And who was in the car with you? A. Officer Cole.

Q. What time would you say you arrived at 1229 Euclid Street, Northwest? A. Around nine, maybe nine-fifteen.

Q. In the morning? A. In the morning.

Q. What happened when you arrived at the premises 1229 Euclid Street? A. When I got out of the car I went to the basement apartment and I knocked on the door and I entered, and it was only
43 Lucius' wife was there alone.

Q. Did you talk to her at that time? A. I did.

Q. Did you receive certain information from her? A. I did.

* * * * *

Q. Who went to 144 U Street with you? A. Officer Cole.

Q. What time would you say you arrived at 144 U Street?

A. About 10:00 o'clock, maybe a little after.

Q. Was that Northwest? A. Northwest.

Q. And in the District of Columbia? A. In the District of Columbia.

44 Q. What happened when you arrived at 144 U Street, Northwest?

A. I rang the bell at the first floor apartment where I found Lucius and an unidentified colored man with him.

Q. Did you have any conversation with the defendant Johnson at that time? A. I did.

Q. What conversation or talk did you have with the defendant Johnson at that time? A. I told him that I was back in Washington to purchase some more drugs, meaning capsules of heroin.

Q. At the time that you had this conversation with Johnson where was Mr. Cole? A. He was in the car.

Q. Relate the conversation you had with Johnson. A. I told Johnson I was back in the District of Columbia to purchase some more drugs, meaning capsules of heroin. He then told me that he was going to introduce me to his friend which was an unidentified colored man at 144 U Street, where they got into the car, Johnson and this unidentified colored man, and Johnson told him that I was all right, that I wanted to purchase some narcotics.

Q. Where was Cole at that time? A. He was in the car at the time.

45 Q. Go ahead. Is that all the conversation Johnson had at that time? A. He told him that I was all right, that he had been dealing with me and that I was all right, that he could sell me some drugs. We then, the four of us then left the area of 144 U Street and went directly to Fairmont, where he directed me to park the car.

Q. When you say "he", who are you talking about? A. The unidentified colored man with Johnson.

Q. He directed you to park the car? A. That's right, in the 1200 block of Fairmont Street, and Johnson got out of the car and went through an alley out of R Street. In about 15 or 20 minutes I observed Johnson and this unidentified colored man on the corner. This unidentified colored man stood on the corner. Johnson immediately came to the car and give Officer Cole a cellphone cigarette package with a quantity of capsules filled with white powder. In the future of that Officer Cole and I had separated the money. I then give Johnson \$16.00 and Officer Cole

also give him sixteen.

Johnson then stated to us that the area was hot and for us to move out of town before we get pinched. He then went back to the corner where this unidentified colored man was standing and we then left the area and met with the agents and turned the evidence over to them.

46 Q. At that time did you or Cole give the defendant Johnson or this man any order form issued by the Secretary of the Treasury for the purpose of purchasing narcotics? A. No, we didn't.

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BY MR. McLAUGHLIN:

Q. Mr. Levine, on September 19, I believe you said you purchased 20 capsules containing a white powder from the defendant Johnson? A. That is right.

Q. At that transaction did you or Mr. Cole in your presence give the defendant Johnson any order form issued by the Secretary of the Treasury for the purpose of purchasing narcotics? A. No, we didn't.

Q. After you received, that is, Cole received, Government Exhibit No. 4, the 20 capsules, in your presence, then where did you and Mr. Cole go? A. We met with the agents at 5th and Rhode Island Avenue.

48 Q. What agent did you meet there? A. Agent Dick and Agent Fialkewicz.

Q. What did you do when you met them there at that time? A. Officer Cole turned the 20 capsules of heroin over to the agents, and my personal car was then searched, also the same, I was searched, and then I left there and I went home.

Q. All that you have testified, that is, transactions on September 11 of 1956 and the transaction on September 12 of 1956 and September 15 of 1956 and September 19 of 1956 with the defendant Johnson happened within the District of Columbia. Is that right? A. That's right.

MR. McLAUGHLIN: I believe that is all.

CROSS-EXAMINATION

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Q. Did you know the defendant prior to September 10, 1956?

A. I met him.

Q. And when did you meet him? A. I met him on the 9th.

Q. And where did you meet him, Mr. Levine? A. I met him on the corner of 11th and Euclid.

Q. Were you alone at the time? A. I was not alone.

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Q. Was he alone at the time? A. When I met him?

Q. Yes. A. No, he wasn't.

Q. Before September 10 had you ever been to his home? A. Before September 10, no, I have never been to his home before September 10.

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JAMES B. COLE

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DIRECT EXAMINATION

BY MR. McLAUGHLIN:

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Q. And whereabouts in Washington were you on September 12?

A. September 12, in company with Joe Levine we met Agents Fialkewicz and Dick and Pappas at the Washington Field Office.

Q. What time of the day or night would you say that was?

A. About 9:00 p. m.

Q. In the morning? A. In the evening.

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Q. When you were in the office at that time with Officer

Fialkewicz and officer Dick, did they give you anything? A. Yes, sir. I observed Agent Fialkewicz search Joe Levine and furnish him -- Agent Dick furnished him \$28.00 of official Government advance money and I was furnished \$20.00 by Agent Fialkewicz.

Q. After you and Mr. Levine were given the money, where did you and Mr. Levine go? A. We then proceeded to Joe Levine's car where his car was searched by Agent Fialkewicz.

Q. Then what happened after that? A. After receiving certain instructions from the agents, we then proceeded to the area of 1229 Euclid Street and parked the car near this location.

Q. Is that the Northwest section of Washington? A. I believe so. I don't know Washington very well.

Q. And when you arrived in that immediate --what time would you say you arrived in the immediate vicinity? A. About 10:45 p.m.

Q. And what happened after you arrived there? A. Joe Levine and I entered the basement apartment of this premises and there I met a colored man by the name of Lucious -- known to me as Lucious.

Q. Do you see that man in court? A. Yes. There is the defendant at that table.

60 MR. McLAUGHLIN: May the record show he identifies the defendant, Mr. Johnson?

THE COURT: Yes.

BY MR. McLAUGHLIN:

Q. What happened when you saw Mr. Johnson in those premises? A. Johnson was there and an unidentified colored female, presumed to be his wife by me, and an unidentified colored man. Joe Levine had a conversation with the defendant Johnson pertaining to purchasing 10 capsules for himself, which was to be \$17.00 and eight for me, which was to be \$12.00.

Johnson then instructed Joe Levine and I to wait in his basement apartment while he left. He returned in about 15 minutes and at that time he separated a quantity of capsules and placed them into separate containers. He gave Joe Levine his container and told him the price would be \$17.00.

At that time Joe Levine counted out \$17.00 to the defendant Johnson, and Johnson stated to Joe Levine that he did not know me well enough to do business with him and wished him to be the go-between. So Joe Levine agreed to this and he gave Joe Levine a piece of paper containing a quantity of capsules containing white powder, which was mine. Joe Levine turned this evidence over to me, and I gave Joe Levine \$12.00 and he gave this money to Johnson.

Q. All in your presence? A. All in my presence.

61 Q. In the presence of Johnson? A. Yes.

Q. I show you Government exhibit marked for identification No. 2A and ask you if you can identify that Exhibit 2A. A. These are the capsules that I observed the defendant Johnson give to Joe Levine, which he gave me.

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Q. After you received Government Exhibit 2A, what did you do with it? A. I met with Agent Dick at the prearranged location and I
62 surrendered my evidence.

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Q. At that time on September 15, did Agent Fialkewicz or Agent Dick give you anything? A. Yes, sir. I observed Agent Fialkewicz search Joe Levine and he furnished me with \$15.00 of Government funds.

Q. Keep your voice up. He furnished you with how much money?
A. \$15.00.

Q. After you received the \$15.00 where did you go? A. Joe
63 Levine and I then proceeded to 1229 Euclid Street.

Q. And how did you get to that 1229 Euclid Street, Northwest?
A. In my personal car.

Q. In your auto? A. Yes.

Q. What time would you say you arrived at 1229 Euclid Street, Northwest? A. About 10:30, quarter of 11:00.

Q. What happened after you arrived at that address? A. I allowed Joe Levine to enter the basement to talk to Johnson.

Q. Did Joe Levine leave the automobile? A. Joe Levine left.

Q. And did you remain? A. I remained.

Q. Where did Joe Levine go? A. He entered the basement of 1229 Euclid Street.

Q. How long did Joe Levine remain in the basement? A. Approximately 15 minutes.

Q. And when he came out, did Joe Levine come out alone?
A. No. He came out in company with the defendant Johnson.

Q. And when he came out with the defendant Johnson, what next
64 happened? A. Johnson and Joe Levine entered the car and at
that time Johnson stated that the town was hot.

Q. Johnson and Levine got in the automobile with you? A. Yes,
sir.

Q. Was there any conversation after Johnson and Levine got in
the car with you? A. He stated--

Q. Who stated? A. Johnson, the defendant, stated that the
town was hot and he had been having a little trouble getting capsules,
but he was willing to travel in pursuit of narcotics for us.

Q. What then happened? A. We drove to various sections of
the town.

Q. When you say, "We drove", who was in the car at that time?
A. Joe Levine, defendant Johnson and myself.

Q. You say you drove where? A. To various sections of the
town.

Q. At whose direction did you drive to the various sections of
town? A. At the defendant Johnson's direction.

Q. Go ahead. What happened after you drove around? A. About
1:00 p.m. Johnson instructed me to drive to Minnesota and Hunt where
he said he would see a man in the service station there, that he could
65 probably purchase narcotics for us.

Q. And did you arrive in that immediate vicinity? A. Yes, sir,
we arrived there.

Q. And what time would you say that you arrived in that im-
mediate vicinity? A. About five minutes past one.

Q. And what happened when you arrived? A. Johnson, the
defendant, left the car and went to the service station.

Q. And how long were Johnson and Levine out of the auto?
A. About five minutes.

Q. Did there come a time when they returned to the auto?
A. Johnson returned and at that time he stated that the man only had 10
capsules, and Joe Levine and I'd have to share them. We agreed to this
and gave Johnson \$15.00 for the purchase of the capsules.

Q. After you gave Johnson the \$15.00, then what next happened?

A. Johnson went back to the service station.

Q. How long did he remain at the service station? A. About five minutes.

Q. Then what happened? A. He returned. At that time he gave
66 Joe Levine a brown manilla envelope containing a quantity of capsules which Joe Levine gave to me. The investigation revealed it to be 10 capsules filled with white powder.

Q. I will show you Government exhibit marked for identification No. 3 and ask you, Mr. Cole, if you can identify those. A. These are the capsules that the defendant Johnson give to Joe Levine and he in turn gave them to me.

Q. Was that after you had given the defendant Johnson \$10.00?

A. Yes, sir.

Q. At that time did you or Mr. Levine in your presence give the defendant Johnson any order form issued by the Secretary of the Treasury for the purpose of purchasing narcotics? A. No, sir.

Q. And those capsules, Government Exhibit 3, contained what when you received them? A. A powder, white substance.

Q. Were there any Government stamps on them of any kind?

A. No Government stamps.

Q. After you received Government exhibit marked for identification No. 3, what in turn did you do? A. I surrendered it to Agent Dick
67 at the prearranged meeting place.

* * * *

Q. And where in Washington were you on September 19 of 1956?

A. In the Washington Field Office.

Q. Was there anyone else present at the time? A. Joe Levine, Agent Dick.

Q. Who else was present besides Levine and Dick? A. That is all.

Q. Did Agent Dick at that time give you anything? A. Yes, sir. He furnished me with \$40.00.

68 Q. Gave you \$40.00. And after Agent Dick gave you the \$40.00, where did you go? A. We then proceeded to 1229 Euclid.

Q. Who do you mean? A. Joe Levine.

Q. How did you proceed? A. In Joe Levine's car.

Q. What time would you say you arrived at 1229 Euclid Street?

A. About 11:00 a.m.

Q. What happened when you arrived there at 11:00 a.m.? A. I allowed Joe Levine to enter the basement apartment.

Q. Did Levine leave the car? A. Yes, sir.

Q. And where did he go when he left the car? A. He entered the basement apartment 1229 Euclid.

Q. How long did he remain in the basement apartment of 1229?

A. Approximately 15 or 20 minutes.

Q. And did he return to the car? A. Yes, sir.

Q. When he returned to the car from those premises, was there anyone with him? A. No, sir.

69 Q. When he returned to the car did you have any conversation with him? A. Yes, sir, I did.

Q. As a result of that conversation what next happened? A. Joe Levine stated to me--

THE COURT: No.

BY MR. McLAUGHLIN:

Q. He said something to you? A. Yes.

Q. As a result of that, what did you do next or where did you go?

A. On the information received from Joe Levine we then proceeded to 144 U Street.

Q. To where? A. 144 U Street.

Q. When you proceeded to 144 U Street, who was in your auto?

A. Joe Levine.

Q. And what time would you say you arrived at 144 U Street, Northwest? A. About 11:30.

Q. P.M.? A. A.M.

Q. What happened when you arrived there? A. I allowed Joe Levine to enter 144 U Street to find the defendant Johnson.

70 Q. Did Levine go in 144 U Street? A. Yes, sir.

Q. How long did he remain in those premises? A. Approximately five minutes.

Q. When he came out, was there anyone with him? A. Yes, sir. He was in company with the defendant Lucious Johnson and an unidentified colored man.

Q. And when Levine came out with the defendant and this unidentified man, then what happened? A. Johnson had a conversation at that time. He stated--

Q. Who did Johnson have the conversation with? A. With me and Levine.

Q. What was the conversation? A. That he was no longer active in the narcotics business but this man could probably find us some.

Q. Referring to what man? A. The unidentified colored man that Johnson was accompanied with.

Q. Then after Johnson said that, what happened? A. Well, they entered the car, Joe Levine, Johnson and the colored man, and we drove to various sections of town.

Q. At whose direction did you drive to the various sections of town? A. At the direction of this unidentified colored man.

71 Q. Was Johnson present at that time? A. Johnson was present.

Q. Where did you finally stop, if you did? A. Finally this unidentified colored man instructed us to drive to the 1200 block of Fairmont Street.

Q. And is that in the Northwest section? A. Northwest.

Q. What happened when you arrived in the 1200 block of Fairmont? A. We parked the car. Both Johnson and this unidentified colored man left the car and walked through an alley way and left my sight.

Q. How long did they remain, that is, Johnson and this unidentified man remain out of your sight? A. About 15, 20 minutes.

Q. And they finally came back? A. Yes, sir.

Q. What happened when the defendant and this unidentified man came back? A. I observed this unidentified colored man standing on the corner, and Johnson returned to the car.

Q. When Johnson returned to the car, what happened then?

A. At that time he gave Joe Levine a cellophane, piece of cellophane from a cigarette pack containing a quantity of capsules.

72 Q. Who gave that? A. The defendant Johnson gave it to Joe Levine.

Q. What was said or done by anyone, either you or Levine or Johnson, at that time? A. Johnson said it would be \$32.00 and I gave Johnson \$16.00 and Joe Levine gave Johnson \$16.00, which I furnished Joe Levine from the \$40.00 that I had received from Agent Dick.

Q. And then after you gave the defendant \$16.00 did you finally receive any narcotics? A. Yes, sir. Joe Levine gave me the capsules, and investigation revealed it contained 20 capsules filled with white powder.

Q. Was the defendant present there at that time? A. No, sir. He had left.

Q. Johnson? A. He had left.

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Q. After you received those capsules from Levine, what did you do with them? A. I met with the agents at the prearranged meeting place and I surrendered the evidence to Agent Dick.

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CROSS-EXAMINATION

BY MR. ROBINSON:

Q. Mr. Cole, were you present with Mr. Levine in this city on September 11, or September 10, 1956? A. No, sir.

Q. It was on September 12, 1956, that you first met the defendant? A. Yes, sir.

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75 FRED T. DICK

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DIRECT EXAMINATION

BY MR. McLAUGHLIN:

Q. Your full name is what? A. Fred T. Dick, D-i-c-k.

Q. And where are you employed, Mr. Dick? A. I am employed as a Treasury agent assigned to the Bureau of Narcotics, Washington, D. C.

Q. Were you so assigned during the month of September of 1956?

A. Yes, sir, I was.

Q. Assigned to the Washington Field Office here? A. Yes, sir.

76 Q. Now, on September 10 of 1956 did you see a man identified to you as Mr. Levine? A. Yes, sir, Mr. Levine, at the Washington Field Office.

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Q. Was there anyone else with you at that time? A. Narcotics Agents Pappas and Fialkewicz were also present.

Q. What did you do, if anything, in reference to Mr. Levine at that time? A. At that time I searched Mr. Levine and I furnished him with \$15.00 of Government funds.

Q. At the time that you searched him did you find any moneys or narcotics on his person? A. I found no paper money on his person, nor did I find any narcotics.

Q. At that time did you give Mr. Levine certain instructions?

A. Yes, sir, I did.

77 Q. As a result of that, did there come a time Mr. Levine left the building? A. Yes, sir, he did.

Q. After he left the building was he under your obsevation?

A. Mr. Levine acompanied me out of the building to the parking lot where his personal vehicle was parked. At that time I also conducted a search of his personal vehicle.

Q. Were there any narcotics in his automobile? A. No, sir, there was not.

Q. After you did that, then what happened to Levine? A. Mr. Levine entered his automobile, and with the other narcotic agents I followed him in a Government car.

Q. Who was in the Government car with you? A. Agent Fialkewicz.

Q. And who was in the auto, if anyone, with Mr. Levine? A. Levine was alone, sir.

Q. Where did Levine go, if you know? A. He drove to Euclid Street and parked just east of 11th Street, Northwest, Washington, D.C.

Q. When he parked there then, did he remain in the car?
A. No, he did not.

Q. What did he do, if anything, under your observation? A. He walked alone to premises 1229 Euclid Street.

Q. What happened when he approached those premises? A. He entered the basement apartment.

78 Q. And how long did he remain in that basement apartment?
A. For about one hour.

Q. Did there come a time when he came out of the basement apartment? A. Yes, sir.

Q. Was there anyone with him when he came out of the basement apartment on September 11? A. That would still be on the 10th, sir. He was accompanied by another colored man as he left the basement apartment.

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79 Q. After Mr. Levine and the defendant got in the car, where did they go to, if you know? A. They drove to various locations, sir, and I conducted a surveillance of them over a two-hour period until approximately 12:30 a.m., on the 11th.

Q. Where did you see them at approximately 12:00 a.m. on the 11th of September? A. They were in the southeast section of Washington, D.C., at about midnight.

Q. Where did they go from there, if any place? A. At that point, at about 12:30 on the morning of the 11th, I lost the surveillance of the car.

Q. You lost the surveillance of the car in what section of the city? A. Southeast section.

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Q. When did you pick the car up later? A. I later picked the car up at 5th and Rhode Island Avenue.

Q. Who was in the car at that time? A. Levine was in the car alone and he was accompanied in another automobile by Narcotics Agent Pappas.

80 Q. And at that time did Mr. Levine turn over anything to you?
A. Yes, sir, he did.

Q. I will show you Government exhibit marked for identification No. 1 and ask you if you can identify that. A. Yes, sir, I can identify it.

Q. And you identify Government exhibit marked for identification No. 1 as what? A. I identify this exhibit as being the 10 capsules of white powder which Levine turned over to me during the early morning hours of September 11, 1956.

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Q. On September 12 of 1956 did you see Mr. Levine? A. Yes, sir, I did.

Q. Where did you see him on September 12 of 1956? A. At the Washington Field Office.

82 Q. And approximately what time on September 12 did you see him? A. At approximately 8:30 p. m.

Q. Was there anyone with him at that time? A. Yes, sir.

Q. Who was with him? A. He was accompanied by Baltimore police officer Cole and narcotics agents Fialkewicz and Pappas.

Q. What did you do, if anything, in reference to either Mr. Levine or Mr. Cole at that time? A. At that time I furnished Mr. Levine with Government funds.

Q. Do you recall how much you gave him at that time? A. I believe I gave him \$29.00, sir. I am not sure of that.

Q. Was any money given to Mr. Cole, either by you or --
A. There was money given to Cole in my presence by Agent Fialkewicz.

Q. After the money was given to Cole and Levine at that time, then what next happened? Where did they go? A. With narcotics agents

Fialkewicz and Pappas I conducted a surveillance.

Q. Where did Levine and Cole go after they left the Bureau of Narcotics? A. They went to the area of 1229 Euclid Street.

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A. I saw them enter the basement premises of 1229.

Q. You say you saw them. Who did you see? A. Levine and Cole.

Q. How long did they remain in the premises 1229 Euclid Street?

A. For about one hour.

Q. And what time would you say they came out, the approximate time? A. They came out at about a quarter of twelve.

Q. When Cole and Levine came out of those premises, was there anyone with them? A. No, sir, there was not.

Q. Did there come a time when you saw or talked to either one, Mr. Cole or Mr. Levine? A. Yes, sir, there did.

Q. When and where was that? A. That was at the narcotics office about 15 minutes later.

Q. I will show you Government Exhibit marked for identification 2A and Government Exhibit 2 and ask you if you received those exhibits.

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A. Yes, I did.

MR. McLAUGHLIN: Please mark this.

(Thereupon, the envelope referred to was marked as Government's Exhibit No. 2B for identification.)

BY MR. McLAUGHLIN:

Q. Showing you Government Exhibit 2A, the 2 and 2A, you identify those exhibits as what? A. I identify these exhibits as the capsules of white powder which I received from Cole and Levine on September 12, 1956.

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Q. On September 15 of 1956 did you see Mr. Levine or Mr. Cole in Washington, D.C.? A. Yes, sir, I did.

Q. Where did you see Mr. Levine and Mr. Cole at that time on September 15 of 1956? A. On the morning of September 15 I saw Mr.

Levine and Mr. Cole accompanied by Agent Fialkewicz at the Washington Field Office.

Q. And what was done at that time, if anything, in reference to Mr. Cole and Mr. Levine? A. At that time in my presence, Agent Fialkewicz searched Mr. Levine, furnished him with Government money, and later searched the vehicle which was used by Officer Cole and Mr. Levine.

Q. After that was done, did Mr. Levine and Mr. Cole go any place from the Bureau of Narcotics office? A. Yes, sir, they did, which Agent Fialkewicz and I observed.

Q. How did they leave there, by what means of transportation? A. In their personal car.

86 Q. Where did they go? A. They went first to the premises 1229 Euclid Street.

Q. Did they enter those premises? A. Mr. Levine did, sir.

Q. What happened to Mr. Cole? A. Mr. Cole waited in the car.

Q. Did there come a time Mr. Levine came out of those premises on September 15, 1229 Euclid? A. Yes, sir.

Q. Was there anyone with him at the time he came out? A. Not that I saw, no, sir.

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Q. Where did they go after Mr. Levine got in the automobile? A. They went first to the area of Delaware Avenue and Virginia, Southwest, Washington, D. C.

Q. Was there anyone with them in the car at that time besides just the two, Cole and Levine? A. Yes, sir, at that time in the car I saw the defendant.

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Q. Did anything happen there while they were in the southwest section of Washington, D.C.? A. I saw the defendant leave the car and then return to it.

Q. How long was he away from the car? A. For a very few minutes, sir.

Q. When he arrived back to the car what next did you observe?

A. I observed the car leave that area.

Q. When it left that area, who was in the car? A. The defendant with Mr. Levine and Mr. Cole.

Q. Did you make any further observation of them after they left that immediate vicinity in the southwest? A. For only a short distance, sir, and then I lost the surveillance.

Q. Did you see either Mr. Levine or Mr. Cole again after you lost the surveillance in the southwest section? A. Yes, sir, later that day I did.

Q. Where did you see them? A. At the Washington Field Office.

88 Q. I will show you Government exhibit marked for identification No. 3 and ask you if you can identify Government Exhibit No. 3. A. Yes, sir, I can.

MR. McLAUGHLIN: Mark this 3A.

(The envelope referred to was marked as Government's Exhibit No. 3A for identification.)

BY MR. McLAUGHLIN:

Q. And you identify Government 3 marked for identification as what? A. This consists of a yellow manila envelope and 10 capsules of white powder which were turned over to me by Officer Cole.

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92 DIRECT EXAMINATION (resumed)

BY MR. McLAUGHLIN:

Q. I believe we had finished talking about the 15th of September.

Calling your attention to the 19th of September of 1956, do you recall on that date whether or not you saw Mr. Levine and Mr. Cole?

A. Yes, sir, I did.

Q. When did you see them on the -- September the 19th of 1956?

A. At about 10:30 a.m. at the Washington field office.

Q. And did you do anything at that time in reference to either Levine or Cole? A. At that time I searched Levine. I searched his

personal vehicle. I furnished Cole with \$40 of Government funds.

Q. As a result of searching them were any moneys or narcotics found on them at that time? A. No, sir, there was not.

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Q. And when he returned to the car then what happened?

A. As he returned to the car, as a result of a conversation with him, I then followed Mr. Levine and Officer Cole to 144 U Street, Washington, D. C.

Q. And what time would you say you arrived at 144 U Street, Northwest? A. At about 11:30.

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Q. And what happened to Cole and Levine when they arrived at 144 U Street, Northwest? A. I again maintained observation of them. I saw Mr. Levine leave the car, walk to 144 U Street, enter by the front door of it. He remained in the building for a few minutes and I saw him come out with the defendant, and with --

Q. When you say "the defendant" who do you mean? A. Lucious Johnson.

Q. Do you see him in court here today? A. Yes, sir, I do.

Q. Will you point at him please? A. He is seated at the counsel table in a sweater and a green plaid shirt.

MR. McLAUGHLIN: May the record show he identifies the defendant?

BY MR. McLAUGHLIN:

Q. All right. What happened after that? A. I saw the defendant, Lucious Johnson, come out of 144 U Street with Mr. Levine and with an unidentified colored man.

I saw the three enter the car in which Officer Cole had waited. The car drove away.

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Q. And did you see either Cole or Levine after that? A. Yes, sir, I did, at about 12:30 p. m. at Fifth and Rhode Island Avenue.

Q. And what happened at Fifth and Rhode Island Avenue? A. Officer Cole turned over to me twenty capsules of white powder and he returned \$8 of unexpended Government funds.

Q. I show you Government's Exhibit, marked for identification, No. 4 and ask you whether or not you can identify that? A. Yes, sir, I can.

Q. And you identify Government's Exhibit marked for identification no. 4 as what? A. I identify Government's Exhibit no. 4 as the twenty capsules of white powder contained in the cellophane cigarette wrapper that were turned over to me on September 19, 1956, by Officer Cole.

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JAMES L. YOUNG

was called as a witness by the United States, and being then and there duly sworn by the Deputy Clerk, assumed the witness stand and testified as follows:

DIRECT EXAMINATION

BY MR. McLAUGHLIN:

Q. Now, your name is what? A. James L. Young.

Q. And you are employed where? A. United States Treasury Department.

Q. And employed in what capacity? A. As a chemist.

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109

BY MR. McLAUGHLIN:

Q. I show you Government's Exhibit marked for identification, 1-A and ask you if you can identify that? A. Yes, I can.

Q. And you identify Government's Exhibit 1-A as what? A. This is an evidence envelope which was handed to me by Federal Narcotics Agent Dick on Wednesday, September the 12th, 1956.

Q. All right. And is there any difference in its condition today than when it was turned over to you by Agent Dick? A. Yes, there is.

Q. And what is that? A. At that time that I received it from the agent it was metal-sealed and the envelope was intact.

Q. And who opened it? A. I opened it.

Q. All right. At the time you opened it did it contain anything? A. Yes, it did. It contained a coin envelope.

Q. All right. Is it in there now? A. This is the coin envelope which it contained.

Q. All right. And that is marked Government's Exhibit for identification, No. 1? A. That is correct.

110 Q. And what did Government's Exhibit No. 1 contain? A. It contained a piece of pink tissue which in turn contained ten capsules, each containing a white powder.

Q. Did you make any analysis of that white powder? A. I did. I individually analyzed the contents of the capsules and each capsule contained a mixture of heroin hydrochloride, a narcotic drug and a derivative of opium, quinine hydrochloride and milk sugar.

And the net weight of the mixture was eighteen and a half grains and it contained 5.17 per cent of heroin hydrochloride by weight.

Q. And that is a derivative of opium? A. Yes, it is.

* * * *

111 * * * *

Q. And what does the Government's Exhibits 2 and 2-A contain?
A. Government's Exhibit 2 contained a piece of paper which in turn held ten capsules, each containing a white powder.

Government's Exhibit 2-A for identification contained a piece of tissue containing eight capsules, each containing a white powder.

Q. Did you make any analysis of Government's Exhibits 2 and 2-A? A. I did, sir.

Q. All right. And what did your conclusions come to? A.
Government's Exhibit 2, the ten capsules, contents were individually analyzed and found to be a mixture of heroin hydrochloride, a narcotic drug, quinine hydrochloride, milk sugar and mannitol. The net weight
112 of the contents was eight and a half grains.

Government's Exhibit 2-A contained eight capsules the contents of which weighed six and seven tenths grains. The capsule contents were individually analyzed and each capsule contained a mixture of heroin hydrochloride, a narcotic drug, quinine hydrochloride, milk sugar and mannitol.

Q. Would you say heroin was a derivative of opium? A. I would, sir.

Q. I show you Government's Exhibit marked for identification 3-A -- I show you Government's Exhibit marked for identification 3-A and ask you if you can identify that? A. Yes, I can.

Q. And you identify Government's Exhibit 3-A as what? A. This is another evidence envelope which was handed to me by the same Narcotic Agent, Dick.

Q. Agent Dick? A. On Monday, September the 17th, 1956.

* * * *

113 Q. At the time that you opened it did it contain Government's Exhibit marked for identification No. 3? A. Yes, it did.

Q.. All right. And what does Government's Exhibit marked for identification No. 3 contain? A. It contained ten gelatine capsules, each containing a white powder.

Q. Did you make any analysis of the capsules? A. Yes, I did. The contents of the ten capsules were individually analyzed and each capsule contained a mixture of heroin hydrochloride, a narcotic drug, and milk sugar, and the net weight of the contents of the ten capsules was eleven grains.

Q. Would you say that heroin was a derivative of opium? A. Yes, I would.

Q. I show you Government's Exhibit marked for identification 4-A and ask you if you can identify that? A. Yes, I can.

* * * *

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Q. At the time that you opened Government's Exhibit 4-A did it contain Government's Exhibit marked for identification No. 4? A. Yes, it did.

Q. And what did Government's Exhibit No. 4 contain? A. It contained a piece of cellophane which in turn contained twenty capsules; each of these capsules contained a white powder which on analysis proved to be a mixture of heroin hydrochloride, a narcotic drug, quinine hydrochloride and milk sugar.

The net weight of the contents of the twenty capsules was thirty-four grains and the percentage composition was 5.79 per cent of heroin by weight.

Q. Would you say that heroin was a derivative of opium?

A. Yes, I would.

* * * *

115

CROSS-EXAMINATION

BY MR. ROBINSON:

Q. Doctor Young, did you personally conduct the chemical analyses of the various Government exhibits? A. Yes, I did. They were analyzed by me in each case.

Q. And did you personally make the notations which appear on the outside of the exhibits? A. I did, sir.

MR. ROBINSON: No further questions.

MR. McLAUGHLIN: All right.

With that, your Honor, the Government at this time would like to offer in evidence Government's Exhibits 1 and 1-A; Government's Exhibits 2 and 2-A and 2-B; Government's Exhibits 3-A and Government's Exhibit 3; and Government's Exhibit 4 and Government's Exhibit 4-A.

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THE COURT: All right. They will be received.

(Thereupon the objects heretofore marked as Government's Exhibits 1 through 4-A for identification, respectively, were received in evidence.)

* * * *

LUCIOUS JOHNSON, Jr.

* * * *

DIRECT EXAMINATION

BY MR. ROBINSON:

Q. Will you state your name, please? A. My name is Lucious Johnson, Jr.

* * * *

118 A. My name is Lucious Johnson, Jr.

Q. And where do you live? A. I live at 1129 Euclid Street, Northwest.

Q. And how long have you lived at that address? A. Since June, '56.

Q. And have you ever at any time lived at 1229 Euclid Street--
A. No.

Q. Northwest? Do you know the person who testified yesterday by the name of Joe Levine or Levine? A. Yes, I have seen him occasionally.

Q. And how did you come to know him? A. I met him through a friend by the name of "Fat Man" from Baltimore.

Q. From where? A. From Baltimore. He came to visit me and this guy, Mr. Levine, was along. After that, I -- Mr. Levine returned to my house a short time later which was about three or four days by himself.

* * * *

123 Q. Have you at any time on the dates mentioned, September the 11th, 15th, 12th and 15th, 19th, sold any drugs to either Levine or Cole? A. No, I never sold drugs in my life.

* * * *

126 Q. One final question: Mr. Johnson, have you ever been convicted of any crimes? A. No, I haven't.

* * * *

127 CROSS-EXAMINATION

BY MR. McLAUGHLIN:

Q. You met Levine the first time about September the 9th; isn't that right? A. During the time that I met Mr. Levine I think it was in August.

Q. Isn't it a fact you met him two or three days before he came to your house for the first time? A. Yes, approximately two or three days.

Q. And who did you meet him through? A. I met him through a fellow they called Fat Man from Baltimore.

Q. Called Fat Man? A. Fat Man.

Q. Fat Man? A. Yes.

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* * * *

Q. Where is the Cozy Corner located? A. On Florida Avenue between Seventh and Eighth.

Q. And is that where you met Fat Man? A. That is where I met Fat Man.

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Q. And is that where you met Levine for the first time?

A. No.

Q. Where did you meet Levine for the first time? A. For the first time when I met Fat Man in the Cozy Corners he -- I hadn't seen him for quite sometime. So he asked me what was my address; that he comes over pretty often.

So I tells him. And on this Sunday -- on one Sunday afternoon him and Levine comes past -- he comes past my house.

Q. With Levine? A. With Levine.

* * * *

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Q. Well now, were you introduced to Levine at that time?

A. Yes, I was.

Q. All right. And what was the conversation at that time?

A. The conversation at that time? They were looking for a good time-- some girls.

Q. They weren't looking for narcotics? A. No. No narcotics was even mentioned the whole evening.

* * * *

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Q. Didn't you say they were looking for the girls? A. Yes, they were. The conversation was of women.

Q. The question is why should they come looking to you to find out where some girls were for a good time? A. I, I don't know.

Q. What? A. Well, Fat Man's a friend of mine; that's all.

Q. A friend of yours? A. Him and I always have conversation together.

Q. Have you been in the habit of going with him for good-time-girls? A. No, I haven't been in the habit of it.

* * * *

Q. All right. On September the 11th he came to your house?

133 A. Yes.

Q. All right. And what did he talk to you about there? A. Well, first, when he came in we were just holding a friendly conversation about different things and he was talking about what a nice time we had had that Sunday.

* * * *

134 A. Well, we just had this friendly conversation. So after -- well, all of a sudden he mentions this about the Fat Man had told him that I was addicted to drugs.

Q. You were a drug addict? A. Yes. That I had once been addicted to drugs; that he didn't know now --

Q. This is now the first time that Levine came to your house inside? A. Yes, this is the first time.

Q. Inside? A. Yes, this is the first time.

Q. The first time he came to the house, inside, the conversation is about narcotics? A. Yes.

135 Q. Isn't that right? A. I mean, eventually; not the whole conversation at first, and then it breaks over to --

Q. That is what I said, but you did talk about narcotics? A. Yes.

Q. Did he tell you that he was a user? A. Yes he did. He said he was addicted to drugs.

Q. Did he tell you that he was a peddler? A. No, he didn't.

Q. Did he tell you he was from Baltimore? A. Yes, he did.

Q. What did he say about Baltimore at the time you were talking about narcotics? A. He said there wasn't any drugs in Baltimore and he was sick.

Q. In other words, Baltimore was red hot as far as drugs was concerned? A. He just said there wasn't any over there; he couldn't find

any over there; that there wasn't any over there.

Q. What did you do when he told you that? A. When he told me that I told him that I wasn't no longer addicted to drugs and that I did not know where I could purchase any.

136 Q. Yes? A. See?

Q. Yes. A. So after that Levine then left, left my house.

Q. Did you leave with him? A. No, I did not leave with him.

Q. All right. Did you see him at all after that, that day?

A. The same -- no.

Q. Isn't it a fact that you got out in your automobile and drove down around M Street? A. No.

Q. Some girls came over to the car? A. No, that was at night. That was on the second -- third -- second trip that he made.

Q. I am talking about September the 11th.

That is the first time he came to your house and came in the house -- A. Yes.

Q. -- when he came alone. Isn't that right? A. Yes, he did. Yes, we did go. That was the same night.

Q. That's it and then you went out in your automobile with him?

137 A. Yes.

Q. And then you drove all around down Seventh and M?

* * * *

A. He got me to direct him to Seventh Street.

Q. For what purpose? A. To the ten hundred block of Tenth Street, rather.

Q. For what purpose? A. To find this girl. He then got out of the car and got --

Q. Wait a minute. Was it to find the girl or was it to purchase narcotics? A. No, it was to find the girl.

138 Q. Now, before you left your house you had a conversation with him about narcotics.

Isn't that right? A. Yes.

Q. And then you said he said he was sick and he needed narcotics? A. Yes. Yes.

Q. And then you testified on direct because you had experience--
A. Yes.

Q. -- as an addict, that when you needed it you wanted it immediately. A. Yes.

Q. Well now, weren't you taking him out to try to get him narcotics? A. I made an attempt that time.

Q. All right. A. No, no, wait. No, I wasn't taking him then to get no narcotics. I made an attempt to help him.

Q. What? A. I made an attempt to help him.

Q. To help him? A. Because I did not know myself where I could make no purchase of narcotics.

139 Q. When you say you made an attempt to help him what did you mean by that? What did you do? A. I told him I did not know where I could purchase any drugs and I never would have left the house with this man if he hadn't said that he was going to find this girl.

So that is why I left the house.

Q. What girl? A. Some girl. He called -- he called her Juanita.

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Q. What happened when you arrived at Clifton Street? A. When we arrived at Clifton Street I told Levine, I says, "I live right -- I can walk right out Twelfth Street to my house". I says, "I am going home now, you know, since you found the girl".

And the girl, she got out of the car, too. The girl went up Clifton Street. I went out Twelfth Street.

Q. Didn't you bring Levine in that house and introduce him to the lady and said he was all right to sell narcotics to? A. I never been in this -- in an address on Clifton Street in my life.

Q. Let me ask you this: After Levine picked that girl up at Tenth and in that cafe, why didn't you go home?

What were you riding around in the car with him for? A. After
141 he picked the girl up at Tenth Street --

Q. Yes, and two or three other girls. A. I had asked him --
this man -- already would he bring me back home and he said -- he
agreed to that.

Q. Yes? A. All right. When he got to Eleventh -- when he got
to Clifton Street that was close enough; only one block. So I told him
then I would go on home; I would walk that block.

Q. All right. Now, how about on the 12th, when he and Cole came
to your house? A. He and Cole?

Q. Yes. A. Cole was sitting in the car when we came out. He
did come to my house.

Q. Yes, and Cole was sitting in the car? A. Yes, he was.

Q. All right. And what did he come to your house on the 12th
for? A. What he came there for?

Q. Yes. A. Well, he stated he came there for him and I was
supposed to have pretty good friends. I took the guy just as a friend
but I have told him to stay away from my house. All right.

142 This time when he comes there he asked me to -- if I would
take him to the whiskey store because we went on Fourteenth Street
to a whiskey store on the 12th; from the whiskey store back home.

That is as far as I went with this man on the 12th.

Q. You didn't get in the car at all? A. No.

Q. You didn't? A. Yes, I got in the car because he drove to
Fourteenth and Monroe Street to a whiskey store.

Q. How far did you have to drive for the whiskey store? A. Oh,
I guess about six blocks.

Q. The whiskey store was open, was it? A. Yes, it was.

Q. Did you buy any whiskey? A. Yes, he was --

Q. After he bought the whiskey what happened? A. We didn't
buy any whiskey. We bought beer, three cans of beer.

Q. After you bought the beer what happened? A. He brought
me back home.

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Q. How about the 15th, when he and Cole came to your house?

A. I don't remember any other occasion. I wasn't -- I couldn't have been home.

Q. What? A. If him and Cole came there on the -- on the third occasion I don't know the dates, but on the third occasion this man came to my house I was not home. That was the time, I guess, my

144

wife sent him to this address on U Street, to 144 U Street.

Q. Well now, were you at 144 U Street? A. Was I at --

Q. Yes. A. Yes, I was.

Q. All right. What were you doing there? A. Well, I had been down to visit a friend.

Q. What? A. This guy was a friend of mine.

Q. All right. Now, at 144 U Street did you see Levine and Cole?

A. I saw Levine. When Levine came to this house he knocked on the door. The lady went to the door and Levine asked for Lucious.

The people did not know me by the name of Lucious. So she asked was that me. So I told her yes and I came to the door and discovered that it was Levine. Then Levine says, "Well, man, come on, let's go have a few drinks", you know.

And I says, "Man, I told you I didn't want anything else to do with you". So he says, "Well," he says, "anyway, I can give you a lift on home". So I agreed with him. I told him I --

Q. Well, how did he know you wanted to go home? A. Because I told him. We had a little -- we had conversation. I mean, every little

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detail I just couldn't name it right off but we had a conversation because we were already -- my friend and I were already fixing to leave the house.

Well, he asked -- I told him that I was going home. He says, "Well, I will give you a lift up that way". Well, this friend of mine says, "Well, I am going on up that away, too". He then gets in the car, too.

When we gets in the car then Cole is there. Okay. On the way to my house then Levine asked this friend of mine about the drugs. The conversation came up about narcotics. So then he asked this friend of mine about narcotics.

So my friend told him, says, "Well, maybe I can make a purchase for you". So, all right. He gave this friend the money when we got to Fairmount Street and Eleventh Street in the eleven hundred block of Fairmount Street. We both got out of the car and went through the alley.

My friend went one way on Euclid Street and I went home. I went the other way home.

Q. All right. How about on the 19th of September, when they testified that both Cole and he came to your house? A. On the 19th of September?

Q. Yes. A. If Cole came to my house he was on the outside when we came out. It's two times that Cole was sitting in the car.

146 Q. Levine came to your house and Cole was sitting outside? I will put it your way. A. Yes, that is the way it was.

Q. Levine, you had previously told him on the very first occasion to stay away from the house? A. Yes, I had.

Q. All right. Now, on the 19th when he came to your house you came out and got in the car with him, didn't you? A. Yes. Because, look, we had conversation. When I came to the door I would always tell this fellow, I say, "Look, man, I told you not to come here if you were seeking narcotics".

He says, "No, I am not seeking narcotics". He says, "I just want to be a friend of yours". He says, "I drinks beer, too".

Q. Well now, every time that he came to your house the conversation ended up about narcotics? A. No. I put it on the narcotics then because I had told the man don't come there any more about it. Well, this time nothing was mentioned about any narcotics on this occasion.

But he said that he had come over to see a friend that was living

somewhere on a -- Minnesota Avenue, Northeast.

147 Q. Yes? A. All right. We then went to Minnesota Avenue, Northeast, and there was no such address on Minnesota Avenue. I never got out of the car.

No one ever got out of the car because he could ride along and see that there was no such address. He then turns around and we comes on back. He puts me out at my house at Eleventh and Euclid.

He didn't go all the way on Euclid as to my house. He puts me out at the corner and I went home.

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161 SUMMATION ON BEHALF OF THE DEFENDANT

By: William A. Robinson, Esquire

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163 The Court at the appropriate time also will give you an instruction concerning -- or possibly may give you an instruction concerning entrapment and in connection with that --

THE COURT: No, I am not going to give the entrapment instruction.

MR. ROBINSON: I said you may possibly give it.

THE COURT: Well, there is no use speculating about it, counsel. I am not going to give it. It doesn't apply to this case.

MR. ROBINSON: Well, I would like to call --

THE COURT: Will you step up to the Bench and I will tell you the reason why.

(At the Bench:)

THE COURT: Entrapment applies only when the defendant concedes that there has been a sale of drugs. Here the defendant denies that he sold any drugs so it can't be entrapment. Those are two inconsistent positions on that.

So I don't want you to be telling the jury that I possibly may give it when I am not going to give it.

* * * *

THE COURT'S CHARGE TO THE JURY

THE COURT: Ladies and gentlemen of the jury: The defendant, Lucious Johnson, Jr., has been on trial before this Court under a twelve-count indictment which charges him with a violation of certain narcotic laws which the Court will explain to you later in his charge.

To this indictment the defendant has entered a plea of not guilty and thus puts in issue each and every essential allegation and element contained in each of the twelve counts in the indictment. At this stage of the trial it is the Court's responsibility to charge the jury with reference to the rules of law that should govern you in your deliberations and which rules of law you should apply to the evidence as you find it to be from the sworn testimony before you and bring in a verdict which will be fair to both parties in this case.

Now, as to the law the Court reigns supreme and you must accept the law just exactly as the Court gives it to you regardless of any opinion you may entertain of your own as to what the law is or what it ought to be. But as to the facts you, ladies and gentlemen of the jury, are the ex-

171 exclusive judges of the facts and it would be improper for the Court to either tell you how to decide this case or intimate by the tone of the Court's voice or in anything that the Court did during the trial, to suggest to you how the facts should be decided.

The Court is anxious to submit the case to you objectively without such impression at all.

Now, the fact that a defendant has been indicted and is charged with a crime does not amount to any evidence of guilt and is not to be taken as an indication of guilt, because an indictment is merely the procedure and the machinery by which a defendant is brought before the Court and is placed on trial.

Moreover, it is a rule of law that every defendant in a criminal case is presumed to be innocent and this presumption of innocence relates to every essential element of the offense and attaches to him throughout the trial until overcome by legal evidence which establishes his guilt beyond a reasonable doubt.

Further, it is the law that the burden of proof rests upon the Government to prove the defendant guilty beyond a reasonable doubt. Now, proof beyond a reasonable doubt does not mean proof beyond all doubt whatsoever. It does mean proof to a moral certainty and not necessarily proof to an absolute or a mathematical certainty. By a
172 reasonable doubt, as its name implies, is meant a doubt based on reason, a doubt for which you can give a reason to yourselves and not just some speculation or conjecture.

Therefore, if after an impartial consideration of all the evidence in this case you can say to yourselves that you are not satisfied of the defendant's guilt, then you have a reasonable doubt. If the evidence is as consistent with innocence as with guilt or if the Government has merely proved that there is a strong probability that the fact charged is true then the Government has not sustained this burden.

But, on the other hand, if you can truthfully and candidly say to yourselves that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters pertaining to your own affairs, then you have no reasonable doubt.

Now, you are the sole judges of the credibility of the witnesses in this case, and it is quite an important responsibility here because of the definite conflict in the testimony here. I don't think this is the type of case where someone could be mistaken by looking at things in a different way. This is the type of a case, it seems to me, where someone isn't telling the truth, and it is going to be for you people of the jury to ferret out the truth and to determine how much credit you shall give to
173 each witness who has taken the stand.

Now, there are certain rules that you will recognize as having often been used in the everyday affairs of your lives where you have been called upon to determine the difference between truth and untruth, or truth and half-truth, that I want to submit for your consideration here in assisting you in the responsibility of determining where the truth is in this case. For example, it is proper for you to take into consideration

insofar as you are able to do so from the manner and appearance of the witness upon the witness stand, whether his testimony was frankly and honestly given; the opportunity and ability of the witness to observe and relate what transpired within his presence; whether he had an accurate memory and recollection or the reverse; the interest the witness may have in the outcome of the trial; to what extent, if at all, his interest may have affected or colored his testimony; whether bias, prejudice, or feeling for or against either side was manifested by the witness, and, if so, whether that colored the testimony in any way; whether the testimony appeared to you to be reasonable or the reverse; that is a pretty good test that I am sure many of you have used in determining the truth of a situation. Did it sound reasonable? That is a test that you may apply to the evidence in this case.

174 And if you find any witness has in this trial testified willfully falsely or corruptly with reference to any material fact concerning which the witness could not possibly have been mistaken, you are at liberty, if you deem it wise to do so, to disregard the entire testimony of such witness or any part thereof except insofar as it has been corroborated by credible witnesses or by facts and circumstances established by the evidence in this case.

Now, this indictment under which the defendant has been brought to trial is in twelve counts. It is so lengthy that I don't think it is necessary for the Court to read the entire indictment to you.

The indictment involves four separate transactions and in each of these four transactions the Government contends that the defendant violated three separate provisions of the United States Code with reference to the sale and distribution of narcotics which provisions of the United States Code I shall explain to you shortly.

These transactions alleged in the indictment are, first, September 11, 1956, involving a violation of three provisions of the United States Code. Now, you will note that in the indictment it alleges that that transaction occurred on or about September 12, 1956, even though the proof here as far as the Government's case is concerned indicates that the

defendant sold narcotics on the 11th of September, even though the in-
175 dictment alleges on or about September 12th. The Court charges
you, as a matter of law, members of the jury, if the Government has
proved beyond a reasonable doubt that the defendant violated these three
sections of the Code, which I will explain to you, with reference to the
sale and dispensation of narcotics on September 11th that is sufficient
to justify a verdict of guilty even though the indictment does allege
September 12th.

So that, first, the Government claims it has proved beyond a
reasonable doubt that the defendant is guilty of Counts 1, 2 and 3, by
reason of the sale of ten capsules of heroin on September 11, 1956. The
Counts 4, 5, and 6, have relation to an alleged sale of eight capsules of
narcotics. I want to go back and say that the Government contends that
the ten capsules on September 11th were sold to Joe Levine and the
Counts 4, 5, and 6, in the indictment have relation to the transaction on
September 11, 1956, wherein the Government claims that eight capsules
of heroin were sold to James B. Cole, the police officer.

The Seventh, eighth, and ninth counts in the indictment have
relation to the date of September 15, 1956, wherein the Government claims
that ten capsules of heroin were sold to James B. Cole. And the last
three counts, 10, 11 and 12, in the indictment have relation to the date
of September 19, 1956, wherein the Government contends that twenty
176 capsules of heroin were sold to James B. Cole, the police officer.

Now, briefly and without endeavoring to spell out all the evidence
in this case and merely to assist you in arriving at a fair verdict and to
refresh your memories as far as the evidence is concerned with reference
to the first occasion on September 11, 1956, when the Government con-
tends that ten capsules were sold to Joe Levine, the Government contends
that it has shown in this case, it has proved beyond a reasonable doubt,
that Levine was employed by the Federal Bureau of Narcotics to secure
the purchase of narcotic drugs. He was, in common parlance, known
as an informer. He was furnished money by the Bureau of Narcotics to
secure the purchase of these drugs.

He went to the twelve hundred block of Euclid Street, Northwest, in the District of Columbia, at 9:45 p. m. on the first occasion on September 10th, to the residence of the defendant.

The Government contends that he asked for drugs on the evening of September 10th. The defendant said that he had sold all of the drugs to the men who had just left but he would try to get some. The Government asserts that about one a. m. on September 11, 1956, Levine went with the defendant to an apartment in the twelve hundred block of Clifton Street, Northwest, and met some men there and the defendant told these
177 men that Levine was all right; that they could deal with him; that Levine gave him \$15 for ten capsules of narcotics, and that those narcotics were sold on that occasion.

The Government further contends that on September 12, 1956, the Federal Bureau men gave Levine \$29 and gave to this Officer Cole, who has testified here, \$20 for the purpose of securing a purchase of narcotics from the defendant; that these two men went to the Euclid Street address of the defendant. Levine said, according to the Government's position, that he wanted to buy more things, meaning heroin, and the defendant thereupon asked Levine who was the man with him, referring to Cole. And Levine stated that he was a friend of Levine's and Levine said, according to the Government's position, that he wanted ten capsules and that his friend, Cole, wanted eight capsules; that the defendant went away on that occasion, came back some fifteen minutes later and separated eight capsules from ten capsules and that he passed Levine ten capsules; Levine gave him \$17 and that the defendant said that he didn't know this other man, Cole, and he wanted Levine to transact the sale as far as Cole was concerned, so that the defendant, according to the Government, gave Levine the capsules to transmit to Cole and the defendant was given \$12 for those eight capsules.

Now, as far as that occasion is concerned, the second occasion on September 12th, the Government is relying only upon the sale of the
178 eight capsules and has not included in the indictment the sale of the ten

capsules which the evidence has referred to as far as that occasion is concerned.

Then on the 15th of September as far as Counts 7, 8, and 9, are concerned, the Government asserts that the Federal officers gave Cole \$15; he went to the Euclid Street address of the defendant with Levine and told the defendant that they had come back for more things, meaning drugs; that Levine and Cole got in the car with the defendant, drove to several places and they finally ended up at an Esso station and that the defendant informed Cole and Levine that the man had only ten capsules. Cole gave the defendant the money and the defendant returned with ten capsules on that occasion.

As far as the September 19th occasion is concerned, having relation to the last three counts in the indictment, it is the Government's position that Levine and Cole went to the Euclid Street address of the defendant. The defendant wasn't present. They talked with his wife. After talking with his wife they went to 144 U Street and they found the defendant at that address with another man. They informed the defendant they wanted to purchase some more drugs. The defendant, according to the Government's position, told this man that Levine was all right; that this man could sell drugs to Levine.

179 Well, the Government asserts that as a result of that conversation and further transactions, that the defendant gave to Cole a cigarette package containing these capsules as alleged in the last three counts of the indictment, twenty capsules, and that the sum of 16 was paid therefor.

Therefore, the Government contends that as far as these four transactions are concerned that it has proved beyond a reasonable doubt that these three separate provisions of the United States Code were violated as to each of the four transactions, and that it has proved that the defendant is guilty beyond a reasonable doubt under each of the twelve counts in the indictment.

Now, you heard the defendant's story here before you on the witness stand. The defendant has testified that he never sold any drugs in his life. He testified at one time he had used narcotics but he had been off of the drugs for sometime. The defendant said he had met Levine once or twice, I believe, before this first occasion of September 11th, and the defendant concedes that Levine came to his premises but he said Levine didn't ask for drugs; that he asked for girls; that Levine didn't know the city and wanted the defendant to assist him in showing him around; and that later on, the defendant has testified, Levine told him that he, Levine, was addicted to the drug habit and pleaded with the defendant to secure some drugs for him.

180 The defendant said that he had sympathy for Levine and because of his sympathy for Levine he made an attempt to secure drugs but with no success and the defendant has testified that never on any occasion did he receive money from either Levine or Cole or anyone else in connection with the purchase or sale of drugs.

The defendant has also testified that on another occasion, I believe, he went with Levine to secure whiskey and I believe the defendant also testified that he did observe on one occasion that a friend who was with him did receive money from Levine but he didn't know what happened after this money had been received by a friend of his from Levine.

And the defendant has also stated in his testimony that he asked Levine twice not to come back to his premises. Thus the defendant asserts, members of the jury, that he is not guilty of any of these twelve counts in the indictment and that the Government has failed to prove beyond a reasonable doubt the charges against him as alleged in each of these twelve counts.

Now, as I indicated to you before, you are the exclusive judges of the facts and it will be your responsibility to take these conflicting stories and to discuss them in determining where the truth is and decide what the facts are and apply the law as I give it to you to those facts and

181 bring in a verdict accordingly.

Now, the three provisions of the law which the Government contends were violated in each of these four transactions are as follows. The first section of the United States Code upon which the Government relies provides that it shall be unlawful for any person to sell, barter, exchange, or give away, any of certain drugs of which heroin hydrochloride is one, except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued for that purpose by the Secretary.

The second provision provides it shall be unlawful for any person to purchase, sell, dispense, or distribute, any of the drugs mentioned, of which heroin hydrochloride is one, except in the original stamped package or from the original stamped package, and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

Now, the third section of the Code upon which the Government relies provides if any person facilitates the concealment or sale of any such narcotic drug after being imported or brought into the United States, knowing the same to have been imported contrary to law, such person shall upon conviction be punished according to law. Whenever on trial
182 for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

Every alleged violation of these laws may constitute an indictable offense so that a person may be charged with one or more violations of the same law or a violation of all three laws for one alleged transaction. In other words, a defendant may be found guilty on all three counts though they involve the same transaction. He may be found not guilty on all three counts or he may be found guilty on one or more counts and not guilty on the others. That applies to all of the four transactions with equal force.

You will observe that the law provides in the first provision I read to you that it shall be unlawful to sell, dispense, or distribute, any of the drugs in the manner set forth. Now, these words are used disjunctively and it is a violation of the provision of the United States Code that I read to you either to sell or dispense or distribute in the manner set forth.

And in the second section of the law which I read to you the law provides it shall be unlawful to purchase, sell, dispense, or distribute, any of the drugs in the manner set forth. These words, likewise, "sell",
183 "dispense", and "distribute" are used disjunctively and it is sufficient if there is proof either of sale or dispensation or distribution. And also under this second section you will note that it provides that the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by a person in whose possession the same may be found.

Prima facie evidence means that which is sufficient to establish the fact unless rebutted. It doesn't mean conclusively. Evidence standing alone and unexplained would maintain the proposition and warrant the conclusion to support that for which it is introduced.

And in the third section the law provides that it shall be unlawful to facilitate the concealment or sale of any of the mentioned drugs in the manner set forth. It may be either concealment or sale. Now, of course, the burden of proof rests upon the Government to prove beyond a reasonable doubt that there was not a written order; that the drugs were not sold, bartered, or exchanged, with a written order. The Government contends that it has proved that in this case.

And in the second section the burden of proof rests upon the Government to prove beyond a reasonable doubt that these drugs were purchased, sold, and dispensed or distributed not in the original stamped package or from the original stamped package and the Government con-
184 tends that it has shown beyond a reasonable doubt that there were no stamps on these drugs that were sold.

The Government, of course, also has the burden of proving beyond a reasonable doubt that the drugs which were sold or dispensed or distributed under these provisions of the Code that I have read to you were prohibitive drugs and the Government contends it has proved that by the testimony of the United States Chemist, Doctor Young, who testified that these drugs were analyzed by him and when received by him were in the same condition they were in when they were sold and distributed by the defendant, and that upon analysis these drugs were shown to have contained the heroin, which is one of the prohibitive drugs under these sections of the Code which I have explained to you.

Now, the law provides, members of the jury, that any person aiding and abetting a principal offender may himself be charged as a principal. Any person advising, inciting, or conniving in an offense or aiding or abetting the principal offender is equally guilty as a principal. If several persons act jointly or in concert, each performing a part that results in the commission of the offense, all are equally guilty.

Now, because of the fact that part of the Government's case at least rests upon the testimony of Levine, a so-called informer, I charge you that the testimony of a paid informer should be scrutinized closely
185 for the purpose of determining whether the testimony is colored in such a way as to place guilt upon a defendant in furtherance of the witness' own interest.

However, you may accept the testimony of an informer if you believe that he is telling the truth. An informer is a competent witness and the use of informers is a recognized means of law enforcement. The credibility of any witness is a question exclusively within the province of the jury.

Finally, members of the jury, in the light of the instructions that I have given to you you will use the same practical approach, the same common sense, the same intelligence, that you would employ in any other important matter in your everyday lives and bring in a verdict here which will do justice to both of these parties. Your verdict must be unanimous.

Upon reaching the jury room you will first select a foreman or forewoman from among yourselves who will preside over your deliberations and speak for you in returning a verdict. Then you will proceed to reach a verdict impartially, without sympathy, passion or prejudice or emotion of any kind, one way or the other.

Written verdicts have been prepared for you, members of the jury. So there are blank spaces with reference to each of the twelve counts in the indictment for you to fill in either the word "guilty" or the
 186 words "not guilty" with respect to each of the twelve counts.

There is a space for the foreman or forewoman to sign and you will have the foreman or forewoman sign on both of these sheets of paper, also fill in the dates, and return the verdict to this Court.

THE COURT: Anything further?

MR. McLAUGHLIN: No, your Honor.

MR. ROBINSON: No, your Honor.

* * * *

VERDICT OF THE JURY

* * * *

187 THE COURT: I think you had better repeat each of the counts so there is no question about them.

THE DEPUTY CLERK: Members of the jury, your foreman says that you find the defendant, Lucious Johnson, Jr., guilty on Count 1, guilty on Count 2, guilty on Count 3, guilty on Count 4, guilty on Count 5, guilty on Count 6, guilty on Count 7, guilty on Count 8, guilty on Count 9, guilty on Count 10, guilty on Count 11, guilty on Count 12, and that is your verdict so say you each and all?

(No member of the jury indicated any dissent.)

* * * *

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13923

LUCIOUS JOHNSON, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA**

OLIVER GASCH,
United States Attorney.

**LEWIS CARROLL,
ARTHUR J. McLAUGHLIN,
JOHN D. LANE,**
Assistant United States Attorneys.

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED

DEC 30 1957

Fogel W. Stewart

CLERK

No. 13923

STATEMENT OF QUESTIONS PRESENTED

Where sufficiency of the evidence to sustain the conviction was not questioned below, and examination of this question on appeal would not be determinative of the validity of a judgment consisting of independently supported concurrent sentences, is it necessary to reach appellant's contention that he was a mere "procuring agent" (not a seller) of narcotics?

Is it not clear that where a defendant denies procuring narcotics he may not rely on the defense that he was entrapped?

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

The instant narcotics conviction was an outgrowth of surveillances in September 1956, conducted by the Washington and Baltimore Field Offices of the Treasury Bureau of Narcotics (R. 75, 76, 86). The Baltimore agents had secured the support of Officer James B. Cole, of the Baltimore Police Department, who had been assigned to work with them under cover (R. 45, 91). In addition there testified at the trial Joseph Levine, a Baltimore oysterman, who had been hired by the Bureau of Narcotics as an informant (R. 24, 49).

There was testimony that on September eleventh, twelfth, fifteenth, and nineteenth sales of heroin hydrochloride, ranging in amount from ten to twenty capsules, were made by appellant—first to the informant, Joseph Levine, and the three other times to Officer Cole, who was with appellant on all but the first occasion (R. 24, 57, 95 *et seq.*).

On these occasions Levine was preliminarily searched, provided with funds on occasion, and followed by Treasury agents

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INDEX

	Page
Counterstatement of the Case.....	1
Statutes Involved.....	6
Summary of Argument.....	7
Argument:	
I. Not Only Was Evidence Sufficient But This Point Was Not Preserved for Review.....	7
II. Appellant Was Not Entitled to an Instruction on Entrapment.....	9
Conclusion.....	10

TABLE OF CASES

<i>Adams v. United States</i> , 220 F.2d 297 (5th Cir. 1955).....	8, 9
<i>Battle v. United States</i> , 92 U.S. App. D.C. 220, 206 F.2d 440 (D.C. Cir. 1953).....	8
<i>Duff v. United States</i> , 99 U.S. App. D.C. 256, 239 F.2d 76 (D.C. Cir. 1956).....	4, 8, 9
<i>Hamilton v. United States</i> , 221 F.2d 611 (5th Cir. 1955).....	9
<i>Higgins v. United States</i> , 81 U.S. App. D.C. 371, 160 F.2d 222 (D.C. Cir. 1946), cert. denied, 331 U.S. 822 (1947).....	2
<i>Hirabayashi v. United States</i> , 320 U.S. 81 (1943).....	8
<i>Jackson v. United States</i> , 94 U.S. App. D.C. 71, 214 F.2d 240 (D.C. Cir.), cert. denied, 347 U.S. 1021 (1954).....	8
<i>Rodriguez v. United States</i> , 227 F.2d 912 (5th Cir. 1955).....	9
<i>Sorrels v. United States</i> , 287 U.S. 435 (1932).....	10
<i>Sullivan v. United States</i> , 95 U.S. App. D.C. 78, 219 F.2d 760 (D.C. Cir. 1955).....	9
<i>United States v. Sawyer</i> , 210 F.2d 169 (3d Cir. 1954).....	8, 9

STATUTES AND RULES

26 U.S.C. § 4704 (a) (Supp. 1957) (Harrison Narcotic Act).....	6
26 U.S.C. § 4705 (a) (Supp. 1957).....	6
33 STAT. 614 (1909), as amended, 21 U.S.C. § 174 (Supp. 1957) (Narcotic Drugs Import and Export Act).....	7
FED. R. CRIM. P. 29.....	8
FED. R. CRIM. P. 52 (b).....	8

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There was testimony that on September eleventh, twelfth, fifteenth, and nineteenth sales of heroin hydrochloride, ranging in amount from ten to twenty capsules, were made by appellant—first to the informant, Joseph Levine, and the three other times to Officer Cole, who was with appellant on all but the first occasion (R. 24, 57, 95 *et seq.*).

On these occasions Levine was preliminarily searched, provided with funds on occasion, and followed by Treasury agents

in accordance with the familiar pattern in these cases,¹ the heroin sold being recovered and analyzed.² Also, as shown above, it is significant in this case that on all but the first occasion the informant was accompanied by an officer in plain clothes who participated.

On the occasion of the first sale of heroin, (the early morning of September 11, 1956),³ the informant, Levine, and appellant had originally gotten together at appellant's apartment, in the basement of 1229 Euclid Street, N. W., the evening of the tenth (R. 25). When Levine arrived only appellant's wife was there. In about ten minutes appellant arrived with three colored men, telling Levine he would speak to him later. When the three left, appellant asked him what he wanted. Levine testified that when he asked for heroin appellant told him that "he had sold the remaining of his drugs to the three colored guys that just left." The first sale subsequently took place at an apartment in the 1200 block of Clifton Street, N. W., where appellant introduced Levine to the proprietor (R. 26 *et seq.*).

Appellant, on the stand, admitted being with appellant on September eleventh, but claimed he had left appellant at the street entrance of the apartment house in the 1200 block of Clifton Street, had not himself entered, and had no knowledge of the sale⁴ (R. 119, 140).

¹ *Higgins v. United States*, 81 U.S. App. D.C. 371, 160 F.2d 222 (D.C. Cir. 1946), *cert. denied*, 331 U.S. 822 (1947).

² In addition to Officer Cole and the informant, Joseph Levine, Treasury Agents Dick and Fialkewicz testified (R. 75, 99 *et seq.*) and a chemist, James L. Young (R. 108).

³ The first three counts of the indictment incorrectly charge this transaction as having occurred September 12, 1956 (R. 34-35).

⁴ Appellant did say that prior to leaving Levine at the apartment he had seen Levine, in his automobile, give money to a woman named "Juanita" on the date of this first sale (R. 122).

Levine, a Baltimorean, testified Juanita and their other companions, were acquaintances of appellant whom he had not known before (R. 54). Appellant, on the other hand, claimed Juanita was unknown to him and a friend of Levine, and that he, appellant, left his apartment the evening of the first sale to help Levine find her in an unfamiliar city (R. 120, 137-140).

It was only in connection with the first sale, to Levine, that appellant's testimony in any way suggested entrapment; as will be seen, he merely denied the subsequent sales to Cole. In connection with entrapment and

The second sale took place in the apartment of appellant and was made to Officer Cole, who accompanied Levine on all occasions but the first (R. 60-61). Levine's testimony that they both entered appellant's apartment on the evening of September twelfth (R. 31) was not only corroborated by Officer Cole (R. 58), but by Treasury Narcotic Agents Dick and Fialkewicz (R. 83, 105). Appellant's version was that they had drunk beer in Levine's parked car and that Officer Cole had never entered his apartment (R. 141-143). This was also in contradiction of appellant's own wife who, on the stand for the defense,⁵ testified that Officer Cole had entered the apartment (R. 135-136).

Levine testified that he (and Officer Cole) entered appellant's apartment on September twelfth and asked for heroin (R. 31). He continued:

"He told me that he could sell me some, and asked me who was the guy with me. I told him he was a friend of mine. He then asked me how many things that I wanted to buy, meaning capsules * * * I told him I wanted to buy ten and my friend (Officer Cole) wanted to buy eight * * * Lucious Johnson told me that ten capsules of heroin would cost me \$17.00 and that eight would cost my friend twelve. We agreed to buy them.

"He stated he would be back in a few minutes. He went out of the basement apartment and was gone approximately around ten to fifteen minutes. He re-

the first sale, therefore, this conflict as to Juanita's status is important. Cross-examination on this point (and a resulting effort to evade any show of knowledge of the sale) led appellant to reduce to unimportance his claim, on direct, that Levine had said he was sick and that he, appellant, had been moved to help out of sympathy (R. 120, 121). Pressed as to whether he left with appellant to help purchase narcotics, or, as he later claimed, to find Juanita, he answered "I told him I did not know where I could purchase any drugs and I never would have left the house with this man if he hadn't said that he was going to find this girl. So that is why I left the house" (R 138). This was consistent with his denial that he was present when this or subsequent sales took place.

⁵ Mrs. Johnson's testimony on direct was restricted to the transaction on the twelfth (R. 160). She testified she had not observed any money or packages pass (R. 135-6).

turned. As he entered the house he separated the eight capsules from the ten he was going to sell—sell me. He then passed me the ten capsules filled with white powder and in return I gave him \$17.00.

"He stated to me that he didn't know my friend good enough to make a hand-to-hand sale with him.⁶ He asked me would I transact the sale. I told him I would. He then handed me the eight capsules of heroin. I handed them to Officer Cole. He give me \$12.00, and in return I passed it to Lucious Johnson * * * G."

Appellant flatly denied ever selling narcotics to Officer Cole (R. 122), and, as has been seen, that Cole was even in his apartment on the occasion of the second sale, September twelfth.

The third sale took place early afternoon of September 15, 1956. Levine testified that he drove appellant and Officer Cole, at appellant's direction, to Minnesota and Hunt Streets, N.E. (R. 38-39). The sale followed a familiar pattern.⁷ Appellant, according to Levine, left the car and went to a gasoline station. Returning to the car appellant got the money and went back to the station. In ten minutes he returned with the heroin previously ordered, passing it to Levine to hand to Officer Cole (R. 38-39). Officer Cole corroborated (R. 66).

Appellant completely denied knowledge of the third sale (September 15, 1956). Levine's testimony as to appellant's performance at Minnesota Avenue and Hunt Streets being corroborated by Officer Cole (R. 66), appellant did refer to his presence with them in that vicinity. His version was that they were looking for an address on Minnesota Avenue, which they never located; no one left the car (R. 147).

The fourth and final sale, the third to Officer Cole, also followed a familiar pattern. See note 7. Levine met appellant at the apartment of a friend of the latter's on U Street the morning of September nineteenth (R. 43-44). Appellant, Levine, and this unidentified colored man left the latter's apartment and went to the car where Officer Cole was waiting

⁶ Officer Cole corroborated this conversation and activity (e. g., R. 60-61).

⁷ E. g., Brief for Appellee, pp. 1-3, *Duff v. United States*, 99 U.S. App. D.C. 256, 239 F.2d 76 (D.C. Cir. 1956). See also note 1.

(R. 44). According to Levine, when he stated to appellant he had returned from Baltimore for more heroin the appellant had told him he was going to introduce him to his friend, the unidentified colored man at the U Street apartment. Levine testified "He told him that I was all right, that he had been dealing with me and I was all right, and he could sell me some drugs" (R. 44-45). The four, including Officer Cole, went to the twelve hundred block of Fairmont Street, N. W., where, at appellant's friend's direction, they parked near an alley. Appellant and his friend got out, appellant later bringing narcotics to Levine and Officer Cole and taking their money. According to Levine, "Johnson then stated to us that the area was hot and for us to move out of town before we get pinched." Appellant then left, joining his friend at the corner (R. 45).

Appellant admitted being in the car, hearing a discussion with his friend about narcotics, seeing money pass, and getting out with his friend. But he denied seeing, much less passing, any narcotics and did not know what happened between his friend and Officer Cole and Levine later, claiming to have walked off before any sale was consummated (R. 125-26).

Neither by way of opening statement, by requested instructions, in cross-examining of Government witnesses, nor in the course of interrogating the appellant and his wife (R. 117, 148 *et seq.*) was it stated that entrapment was being raised.⁸ No motion for judgment of acquittal on this or any other ground was made (R. 158). This defense was first mentioned incidentally in the course of closing argument in language conceding a doubt on appellant's part that the defense was available on the record: "The Court at the appropriate time also will give you an instruction concerning—or *possibly may give you* an instruction concerning entrapment * * *" (R. 163; emphasis supplied). Thereupon the following transpired:

The COURT: No, I am not going to give the entrapment instruction.

⁸ No opening statement was made nor were written or oral instructions submitted or requested at the close of the testimony or before or after the charge (R. 23, 117, 158, 170, 186).

Mr. ROBINSON: I said you may possibly give it.

The COURT: Well, there is no use speculating about it, counsel, I am not going to give it. It doesn't apply to this case * * * Will you step up to the Bench and I will tell you the reason why.

(At the Bench:)

The COURT: Entrapment applies only when the defendant concedes that there has been a sale of drugs. Here the defendant denies that he sold any drugs so it can't be entrapment. Those are two inconsistent positions on that.

So I don't want you to be telling the jury that I possibly may give it when I am not going to give it.

(End of Bench Conference.)

At the close of the charge, in the course of which the trial judge fairly summed up the defense (R. 167), the court asked counsel if there was anything they wished added, to which the defense replied no (R. 186). Found guilty as indicted on all twelve counts growing out of the four sales above mentioned,⁹ appellant was given concurrent sentences aggregating two to eight years (R. 7).

STATUTES INVOLVED

26 U.S.C. § 4704(a) (Supp. 1957) (Harrison Narcotic Act):

It shall be unlawful for any person to purchase, sell dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

26 U.S.C. § 4705(a) (Supp. 1957):

It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pur-

⁹ Each sale was the subject of three counts, two based on the Harrison Narcotic Act (requiring that sales involve the original stamped package and be pursuant to official forms) and the third on the Narcotic Drugs Import and Export Act. See *Statutes Involved, supra*.

suance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.

33 STAT. 614 (1909), as amended, 21 U.S.C. § 174 (Supp. 1957) (Narcotic Drugs Import and Export Act):

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five nor more than twenty years and, in addition, may be fined not more than \$20,000 * * *.

SUMMARY OF ARGUMENT

I

Sufficiency of the evidence to sustain the conviction was not questioned below as appellant made no motion for judgment of acquittal. There are no special circumstances warranting discretionary review of his contention he was a mere "procuring agent" not a seller of narcotics. The concurrent sentences imposed are supported by a count free of any factual trace on which to base the argument.

II

As appellant denied procurement of narcotics he may not rely on the defense that he was entrapped into selling them.

ARGUMENT

I

Not only was evidence sufficient but point was not preserved for review

Appellant's first argument (Br. 18) is that the court should have directed entry of a judgment of acquittal because the

evidence established appellant was a "procuring agent" of the Government witnesses, not a seller of narcotics, citing *Adams v. United States*,¹⁰ 220 F.2d 297 (5th Cir. 1955), and the case from which it stems—*United States v. Sawyer*,¹¹ 210 F.2d 169 (3d Cir. 1954).

Unlike the *Adams* case, appellant, as shown by the counterstatement, made no motion for judgment of acquittal below and thus did not preserve the point for review on appeal. Fed. R. Crim. P. 29; *Battle v. United States*, 92 U.S. App. D.C. 220, 206 F.2d 440 (D.C. Cir. 1953).

Further, there is nothing in this record to invoke the discretionary power of this Court to rectify "manifest error or serious injustice". *Id.* at 221; Fed. R. Crim. P. 52 (b). In contrast to the *Adams* and *Sawyer* cases, the sales to Officer Cole were flatly denied and there was no contradiction that any dealings with Officer Cole were at arm's length. Officer Cole was not a friend of appellant's, and there is no dispute that even the special employee, Levine, had only known appellant a few days.

The second sale, to Officer Cole, took place in appellant's apartment and was denied outright, appellant's claim the officer had not entered his apartment being incidentally refuted by appellant's own wife. As the counterstatement indicates, this count alone supports the concurrent sentences imposed. See *Hirabayashi v. United States*, 320 U. S. 81 (1943); *Jackson v. United States*, 94 U. S. App. D. C. 71, 214 F.2d 240 (D.C. Cir.), *cert. denied*, 347 U.S. 1021 (1954).

While the other counts need not be explored for the two reasons before stated, it was nevertheless indicated in the counterstatement that the third and fourth sales followed a familiar pattern similar to that considered in the *Duff* case,

¹⁰ In the *Adams* case a drug addict informer got heroin from a female addict for the going price. He was a friend and he admitted that she had lent him narcotics. She testified she had procured the narcotics after he had claimed illness. Finding this evidence uncontradicted the Court ordered entry of a judgment of acquittal.

¹¹ In the *Sawyer* case a conviction of violating the Harrison Act by selling heroin was reversed with directions to grant a new trial. The evidence was conflicting, that of the appellant supporting a conclusion that he was a "procuring agent" of the undercover officer rather than a seller and that the agent had importuned him, feigning a fit. Although requested, no instruction on this point or on entrapment was given.

affirmed *per curiam*. Note 8 and text *supra*. Even though the point was raised below, the *Adams* and *Sawyer* cases did not require discussion by the Court in affirming Duff's conviction.

It is therefore concluded that not only is appellant's objection to the evidence too late but no special circumstance requires exercise of discretionary power to examine it outside the ordinary bounds of appellate review.

II

Appellant was not entitled to an instruction on entrapment

Appellant's second argument takes issue with the trial judge's ruling, described in the counterstatement, that appellant's denial of his acts precluded an instruction on entrapment. In so holding the court below was clearly correct. In *Rodriguez v. United States*, 227 F.2d 912 (5th Cir. 1955) it was held there was no error in refusing a requested instruction on entrapment where there was a denial of commission of the act. There the Court stated:

"* * * in refusing to charge the jury on entrapment, the Court stated that the defense was not available where, as in this case, the defendant denies the very acts upon which the prosecution and the defense are necessarily predicated. It is true that this defense may be raised even though the defendant pleads not guilty, but it 'assumes that the act charged was committed', and where the defendant insists, as she did here, that she did not commit the acts charged, one of the bases of the defense is absent".

Id. at 914. See also *Hamilton v. United States*, 221 F.2d 611, 614 (5th Cir. 1955).

It is also to be considered that the requirement that entrapment must unequivocally be presented is just. The peculiar nature of the defense permits the Government to introduce evidence of criminal tendency, normally incompetent because danger of prejudice outweighs probativeness. *Sullivan v. United States*, 95 U.S. App. D.C. 78, 79, 219 F.2d 760 (D.C. Cir. 1955). A defendant should especially not be permitted to deny his acts, to remain completely passive on the issue of

entrapment, and then to voice this defense for the first time in closing argument.

As the counterstatement reveals, appellant did not cross-examine the Baltimore Federal narcotic agent at all nor in any way attempt to develop this defense through the police officers either, as is sometimes permitted, during the course of the Government's case or in his own case in chief. Yet the gist of the defense is the germination of a criminal plan in the mind of a law enforcement officer and its operation on a defendant not otherwise disposed to break the law in question. *Sorrels v. United States*, 287 U.S. 435 (1932). If the rule were otherwise a defendant could keep from the jury conditionally competent indications of his predisposition to crime until too late for the officers to show, in the public interest, that prior to the use of decoys there had been reasonable grounds to believe that he had been violating the law involved.

It will be recalled that appellant himself, at the trial level, was in doubt whether entrapment lay. Clearly, therefore, the court below was not in error in making its ruling, which is supported in authority and reason.

CONCLUSION

It is respectfully submitted that there was no error and therefore the judgment of conviction should be affirmed.

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